Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TCW SPECIAL CREDITS,
Plaintiff-Appellant,
v.
FISHING VESSEL CHLOE Z,
Defendant,
v.
JUAN BARANDIARAN, et al.,
Plaintiffs-Intervenors-Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit have the authority to defy this Court's unbroken line of decisions in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1992); *Isbrandtsen Co. v. Johnson*, 493 U.S. 779 (1951), *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943) and *Warner v. Goltra*, 293 U.S. 155 (1934), requiring that seamen's protection and relief statutes be applied as written and liberally interpreted in favor of the seamen?

2. Did the Ninth Circuit have authority to judicially rewrite 46 U.S.C. § 11107 to include an unlegislated restrictive qualification which eviscerates the remedy provided to seamen by Congress, where Congress had specifically required "that the literal language of the statute should control the disposition of the cases?"

3. Could Congress have intended 46 U.S.C. § 11107—the enforcement mechanism for 46 U.S.C. § 10601's mandate that fishermen be provided with written agreements—to be judicially revised to create powerful disincentives to provide such written agreements?

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I.

OPINIONS BELOW.

The opinion of the Ninth Circuit Court of Appeals, filed December 5, 1997 (App. A), is reported at 129 F.3d 1330. The district court for the Territory of Guam's Memorandum Order is not officially published, but it appears in the American Maritime Cases at 1997 A.M.C. 1377 and is reprinted at Appendix B. The opinion of the district court for the Southern District of California (addressing the same legal issues, involving most of the same parties and of which the Ninth Circuit twice denied judicial notice), is not published but is reprinted at Appendix E.

II.

JURISDICTION.

The Ninth Circuit Court of Appeals entered its order denying Petitioners' petition for rehearing and suggestion for rehearing en banc on January 26, 1998. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Because the statutes involved are federal, and address Seamen's Protection and Relief (46 U.S.C. §§ 10601 and 11107) they fall within the court's federal question and admiralty jurisdiction under 28 U.S.C. §§ 1331 and 1333, respectively.

III.

WHY THE PETITION SHOULD BE GRANTED.

A. Summary.

This petition arises from the Ninth Circuit's misinterpretation of 46 U.S.C. § 11107, the enforcement provision for 46 U.S.C. § 10601, which requires shipowners to provide their seamen with written fishing agreements. Section 11107 provides:

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

The United States District Court for the Territory of Guam had held that § 11107 means exactly what it says, and awarded recovery at the highest rate of wages for a seaman at the port of engagement. On appeal, the Ninth Circuit ignored § 11107's plain meaning. The court refused to give effect to *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564 (1992), and judicially rewrote § 11107 to include an unlegislated restrictive qualification. The Ninth Circuit held:

> [W]e conclude that Section 11107 is properly construed as having the following effect. It . . . (3) entitles the wronged seaman to recover either his promised wages or the highest rate of

> wages of *a seaman of comparable rating* at the port from which he was engaged, whichever is higher.

TCW Special Credits v. F/V CHLOE Z, 129 F.3d 1330, 1334 (9th Cir. 1997) (emphasis added).

This unauthorized judicial redrafting of § 11107 disregarded well-established rules requiring application of the plain language of seaman's remedial and protective legislation. It also controverted the express intent of Congress concerning this precise group of statutes. As stated by House Report No. 98-338 reporting revisions to Part G of Title 46, which contains § 11107:

> The committee also feels, as the courts have held, that the *literal language* of the statute should control the disposition of the cases. (emphasis added).

House Report No. 98-338, p. 120, App. F.

This petition presents an important question of federal law which has not been, but should be decided by this Court. The uniform interpretation and application of seamen's protection and relief statutes is a longstanding matter of paramount federal concern both for Congress and the Courts, and has been the subject of numerous decisions by this Court. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *Isbrandtsen Co. v. Johnson*, 43 U.S. 779, 782 (1951); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-735 (1943); *Warner v. Goltra*, 293 U.S. 155, 162 (1934), to name just a few. These cases uniformly hold that the remedies provided by Congress to seamen must be literally applied. These statutes are meant to be

protective to seamen and punitive to offending shipowners. Given the important of uniformity in maritime statutory law, the court has often granted certiorari in such statutory cases without awaiting developments in the circuit courts of appeal. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987); *Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Perini North River Associates*, 459 U.S. 297 (1983); *Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 461 U.S. 624 (1983); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *U.S. v. United Continental Tuna Corp.*, 425 U.S. 164 (1976).

The Ninth Circuit has gutted § 11107's remedy by reading an unlegislated restrictive qualification into that statute's plain language. If the court permits this judicially-imposed limit to be given effect, the punitive incentive Congress fashioned to force shipowners to provide written agreements to fishermen will be destroyed.

Under the Ninth Circuit's construction of § 11107, penalty wages will never be awardable, no matter how clear the violation or egregious the shipowner's conduct. Congress did not intend that illegally engaged fishermen be dragged through years of fact-intensive litigation by well-heeled shipowners and mortgagees over notions of "comparability" of ratings. Bear in mind that no attorneys' fees are provided by this statutory scheme and that wages in this industry are competitive. Under the Ninth Circuit's reading of § 11107, there could be no conceivable penalty wage award. The rate of wages finally recovered after years of legal struggle would be by definition no greater than the illegal oral rate, and would be further reduced

by the fishermen's attorneys fees.[1/] Without fear of sanction, why would shipowners comply with § 10601?

We respectfully and urgently ask that the court accept this case, on behalf of the Crew of CHLOE Z, still unpaid after over 2 years, for the 11 other crews cheated by the same shipowner and for the sake of the thousands of American Flag fishermen. Fishermen, like all seamen are the wards of this Court. *See, e.g., Isbrandtsen v. Johnson*, 343 U.S. 779, 783 (1951). Their only real protection from shipowner and mortgagee oppression is the swift, vigorous and uniform application and enforcement of the statutes Congress provided for this purpose.

B. Factual Background and Proceedings Below.

The petitioners are the crew of the F/V CHLOE Z, an American flag tuna seiner (hereinafter the "Crew"). CHLOE Z was one of twelve vessels owned by various shell corporations controlled by Lawrence Zuanich. Zuanich systematically cheated the Crew on their orally promised wages, misappropriated their tax withholdings and abandoned his crews and vessels without payment of a year of wages, funds for repatriation, or food. Zuanich had illegally engaged all of his crews, including petitioners, with oral promises of payment on a rate based on tons of fish caught and delivered to the cannery, less rejects. Oral contracts with fishermen are *per se* illegal. 46 U.S.C. § 10601 provides:

1/ This assumes that a penniless fisherman, likely marooned in a distant port, could find a lawyer to represent him in years of complicated fact litigation against wealthy adversaries over modest sums of money with no possibility of a significant premium or an attorneys' fees recovery.

> (a) before proceeding on a voyage the master or individual in charge of the fishing vessel, fish processing vessel, or fish tender shall make an [sic] fishing agreement in writing with each seaman employed on board . . . . (b) the agreement shall also be signed by the owner of the vessel . . . .

The sanction for violating § 10601 is prescribed by §11107, which provides:

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

As Zuanich and his family drained more money from these shell corporations, he periodically manipulated the orally promised rates of pay, once even decreeing a 10% reduction of the Crew's promised compensation in the middle of a voyage.

Zuanich apparently also failed to pay his mortgage on the vessel. That mortgage was held by appellant below, TCW Special Credits ("TCW"), a California investment partnership which specializes in purchasing distressed debt. TCW had purchased the Zuanich debt at fifty cents on the dollar and collateralized its mortgage on CHLOE Z with two other Zuanich vessels. TCW stood to make millions in profits if one or more of the collateralized vessels could be foreclosed upon and sold at their market price. TCW foreclosed on CHLOE Z

following Zuanich's default, and evicted the desperate Crew onto the docks of Guam. TCW later attempted to coerce the Crew into unjust, lowball settlements behind the backs of their attorneys, using false promises, unethical contacts and black-mail, until this predatory conduct was discovered and enjoined by the district court.

The Crew intervened in TCW's foreclosure action in Guam and moved for summary judgment pursuant to 46 U.S.C. § 11107. The Crew argued that the highest rate of wages in the port of engagement was (at a minimum) the highest rate of any seaman aboard the vessel, a rate which varied between $39.00 and $40.00 per ton of tuna delivered to the cannery, depending on the voyage.

TCW opposed the motion, arguing that § 11107, despite its plain language, must be interpreted to include a restrictive qualification limiting the highest rate of wages to a seaman of comparable job, age, experience, qualifications and rank, intensely factual questions never resolvable absent a trial on complicated proofs.

The district court, relying on the statute's plain meaning held:

> Here, plain meaning of the term 'highest rate of wages' settles the issue. The language of the statute is clear and no contrary legislative purpose has been expressed. The statute plainly states that under § 11107 the wage entitlement is the higher of 'the highest rate of wages from the port in which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement.' Nothing in the language

> of the statute, or the legislative history, authorizes any limit to a seaman's right to 'the highest rate of wages' at the port. Nor does the language or words selected by Congress imply, directly or indirectly, that this rate of wages must be limited to the rate of a similarly rated seaman. Accordingly, the plain language of § 11107 is determinative—where a vessel owner fails to comply with § 10601 the vessel's seamen are entitled to the amount agreed upon before the voyage or the highest rate of wages paid at the port of engagement.

1997 AMC 1377, 1382 (D.C. Guam 1997), App. 24(a).[2/]

The Ninth Circuit reversed. Ignoring the fact that § 11107 refers to "seamen" four times, the court found that it was "unclear" whether the benchmark earner for purposes of application of penalty wages refers to, seamen, or, "the CEO of a corporation headquartered in the port" (obviously not a seaman), or "a cruise ship captain" (who is not covered by §§ 10601 or 11107). 129 F.3d at 1333, App. 9a. Without citing to any support in the legislative record, the court speculated that Congress could not have meant to ignore "traditional

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2/ An identical conclusion was also reached by the United States District Court for the Southern District of California in four parallel cases also arising from the collapse of the Zuanich fleet. *United States v. F/V LARRY Z,* United States District Court, Southern District of California, Docket No. 96-1663 BTM (JFS), (hereinafter "LARRY Z"). The United States held First Preferred Ship Mortgages on those four vessels and instituted, as TCW had done in Guam, foreclosure actions in which the Crew intervened. A copy of the Southern District's opinion is provided at Appendix E.

maritime distinctions" between officers and seamen in fashioning the remedy for violation of § 10601. Finally, the Ninth Circuit erroneously reasoned that allowing an aggrieved seaman to measure penalty wages by the highest rate paid to any seaman aboard the vessel would erase any meaningful election between his illegal oral wages and the "highest rate of wages in the port of engagement."

Unwilling to literally apply the statute, the Ninth Circuit added a fundamental limitation to the remedy never before recognized or articulated by Congress, the courts or even the parties. Relying on supposed "traditional maritime distinctions" nowhere mentioned in the statute or the legislative history, as well as the term "rate" in the statutory phrase "rate of wages," the court held that § 11107 *really* means that an aggrieved seaman under § 10601 may recover either his oral wages or the highest rate of wages for a seaman of *comparable rating*. Appendix at 12a.[3/]

[3/] The Ninth Circuit's surprisingly brief analysis also relied upon some unusual selections of authority. The Court cited with approval to a series of one hundred plus year old district court cases under § 11107's predecessor statutes. These ancient cases are entirely bereft of analysis and reach varied and inconsistent results. The court simultaneously failed to discuss or distinguish any of the analysis presented in the district court's 28 page memorandum order , acknowledged *none* of the cases of this Court urged by the Crew and accepted by the district court as authoritative, and *twice* refused to take judicial notice of the Southern District of California's contemporaneous decision interpreting § 11107 with respect to the *same* fishing fleet and involving most of the same parties present in the appeal. *See* App. E, and App. 51a, 53a. No explanation was provided for refusal to take judicial notice of recent, on-point authority while crediting aged and largely irrelevant district court cases. No mention or distinction of this Court's cases

This was error. By judicial fiat the Ninth Circuit has in fact *eliminated* the recovery of penalty wages provided by Congress under § 11107 and created a disincentive for vessel owners to furnish their crewmen with written fishing agreements. The Ninth Circuit Opinion encourages the manipulation, overreaching and noncompliance which the legislation was designed to deter and penalize.

IV.

REVIEW BY THE COURT IS NECESSARY TO REDRESS THE NINTH CIRCUIT'S AD HOC JUDICIAL REVISION OF THIS IMPORTANT ADMIRALTY STATUTE.

The Ninth Circuit ignored this Court's repeated direction to interpret statutes according to their plain meaning, and has essentially rewritten the cornerstone of Congress' protection of American flag fishermen, 46 U.S.C. § 11107. That important statute is the sole enforcement mechanism for the wage protection provisions of the Commercial Fishing Industry Vessel Safety Act, enacted in 1988 as part of the recodification of Title 46. The unadorned language of § 11107 provides that:

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the

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was offered.

> seaman at the time of engagement, whichever is higher.

46 U.S.C. § 11107.

The purpose of § 11107 is to enforce the important statutory requirement that seamen be provided written articles prior to embarking on a voyage. Absent written articles, seamen are subject to the sort of overreaching and oppression encountered through the centuries and in this case. A shipowner who violates 46 U.S.C. § 10601's clear command is deprived of the benefit of his illegal oral bargain, and is compelled to pay a statutorily set and summarily determinable penalty wage potentially far higher than the illegally set oral wage. The power of § 11107 (*as written*), is its simplicity of application. If the shipowner violates § 10601 an aggrieved seaman institutes a summary proceeding to recover penalty wages under § 11107. The offending shipowner would be prevented from dragging out the proceedings (for *years*) by arguing complicated issues of pleadings and proofs, and would therefore be unable to take further advantage of the seaman.

Prior panels of the Ninth Circuit had held the purpose of § 11107 was to "provide for a penalty against vessel owners who employ seamen without written agreements in violation of § 10601." *Seattle-First Bank v. Conaway*, 98 F.3d 1195, 1198 (9th Cir. 1996) citing and adopting the Alaska Supreme Court's decisions in *Bjornsson v. U.S. Dominator*, Inc., 863 P.2d 235, 238-40 (Ak. 1993). Indeed, every court which has considered the issue has understood that the "highest rate of wages" remedy contains a punitive element. *See, e.g., Jamison v. THE REGULUS*, 13 F.Cas. 336 (D.Penn. 1800) ["this point has been determined several years ago, in this court. If a seaman ships and performs his contract, though verbal, he must be paid, at

the highest rate of wages, given at the port of shipment . . . *It was fixed at the highest rate, that masters might be more on their guard, and see that the articles were executed, and thereby avoid the payment of the highest wages to ordinary seaman.*" (emphasis added)]; *Chung v. Overseas Navigation Company, Inc.*, 774 F.2d 1043, 1049 n.7, (11th Cir. 1985) ["Highest rate of wages" (46 U.S.C. §§ 575, 578) are "penalty provisions"]; *Triventure Investment, Inc. v. M/V MIDAS, et al.*, 1996 A.M.C. 424 (W.D. Wash. 1995) ["a major sanction is provided by 46 U.S.C. § 11107 making oral agreements void and providing for the recovery of wages at a potentially higher rate than agreed upon" (emphasis added)].

The protective and punitive purposes of § 11107 have a long history. The current statute, enacted in 1983, merely recodified 46 U.S.C. § 578, the continuation of Rev. Stat. 4523 (1874). The 1874 statute derived from a 1840 law providing:

> All shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void, and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to *any seaman* shipped for the voyage, or the sum agreed to be given him at his shipment.

Act of July 20, 1840, C. 48 § 10, 5 Stat. 395 (emphasis added).[4/]

[4/] The current statute contains only minor changes from 46 U.S.C. § 578 which read:

> All shipments of seamen made contrary to the provisions of any act of Congress shall be void,

Despite this clear language and statutory pedigree, the Ninth Circuit incorrectly declared that § 11107 only "entitles the wronged seaman to recover either his promised wages or the highest rate of wages of a seaman *of comparable rating* at the port from which he was engaged, whichever is higher." 129 F.3D at 1334, App. 12a. (emphasis added).

The Ninth Circuit's unwillingness to apply the statute as written is typical of historical judicial hostility to the large, potentially punitive awards which characterize the enforcement mechanisms of these protective statutes. Indeed, the appellate jurisprudence in this area of the law is replete with examples of lower courts reluctant to give effect to the penalties Congress intended, and the higher courts' inevitable reversal of these misguided attempts to engraft unlegislated restrictions into statutory remedies. *See, e.g., Griffin v. Ocean Contractors, Inc.*, 458 U.S. 564 (1982); *Chung, Yong Il v. Overseas Nav. Co. Ltd.*, 774 F.2d 1043 (11th Cir. 1985); *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966); *Prindes v. the S.S. AFRICAN PILGRIM*, 266 F.2d 125 (4th Cir. 1959).

The decisions of this Court have repeatedly corrected this misplaced judicial hostility, requiring that seamen's protective legislation, including penalty wage statutes, be applied exactly as written. In *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), for example, the court interpreted another seaman's wage statute, 46 U.S.C. § 596. *Griffin* involved the penalty wage statute applicable to Merchant Marine vessels

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> and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages at the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

addressing nonpayment of wages, which provides an award of two days' pay for each day wages were wrongfully withheld. The principal wages unpaid in that case were about $400, but the application of the statutory formula resulted in an award exceeding $300,000. The district court held that "the period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case," and awarded penalty wages only through the 34 day period from the seaman's date of discharge to the date when he began work for another company. The Fifth Circuit affirmed. This Court reversed. The court held that given the clear language of the statute, the Courts have no discretion to judicially limit the period during which the penalty is assessed. Moreover, the court affirmed that seamen's wage statutes are *meant* to be punitive:

> As the Court recognized in *Collie v. Fergusson*, 281 U.S. 52, 50 S. Ct. 189, 74 L.Ed. 696 (1930), the 'evident purpose' of the statute is to 'secure prompt payment of seaman's wages . . . and to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed. *Id.* at 55, 50 S. Ct. at 191. This was to be accomplished 'by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible.' *Id.* at 55-56, 50 S. Ct. at 191. Thus, although the sure purpose of the statute is remedial, Congress has chosen to secure that purpose through the use of potentially punitive

> sanctions designed to deter negligent or arbitrary delays in payment.

Griffin, 458 U.S. at 572.

Plain meaning is only part of the analysis when interpreting and applying seamen's penalty statutes. This Court has repeatedly held that seamen's remedial legislation *must* be liberally interpreted in favor of that vulnerable class. *See, Griffin, 458 U.S. 564 (1982); Isbrandtsen Co. v. Johnson*, 43 U.S. 79, 782 (1951); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-735 (1943); *Warner v. Goltra*, 293 U.S. 155, 162 (1934). Additionally, the direct legislative history of this group of protective statutes powerfully demonstrates Congress' intent that its chosen language be applied *literally* by the judiciary. As stated by House Report No. 98-338, p. 120, reporting these very revisions to Title 46:

> The Committee also feels, as the courts have held, that the literal language of the statute should control the disposition of the cases. There is no mandate in law or in case law for reliance on legislative history to reach a result contrary to the plain meaning of the statute, particularly when that plain meaning is in no way unreasonable.

App. F. To the extent that legislative material is relevant given the unequivocal language of § 11107, official committee reports are the most authoritative guide as to legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

The clarity of the language Congress chose to express its intent left no room for the Ninth Circuit to rewrite the

statute. A court's objective in interpreting statutory language is "to give effect to the will of Congress . . ." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982), and the starting point is the language of the statute itself. When the statute speaks with clarity to the issue, as here, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 254 (1992). Courts must presume that a legislature says in a statute what it means and it means in a statute what it says. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989).

If given their intended and literal effect, seamen's wage protection statutes afford powerful remedies. Small principal sums owed by the shipowner can be multiplied into enormous and punitive sums where violations are found. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) [penalty wages owed were almost $300,000 on unpaid principal sum of about $400]. These remedies express Congress' determination to ensure shipowner compliance by making the consequence of violation of seamen's rights an expensive, even potentially ruinous choice.

Lower courts have periodically placed their sense of justice in the particular case above their duty to apply these statutes as written. The jurisprudence in this area of the law is consequently marked by a series of reversals by higher courts. The lower courts periodically backslide, however, and resort to revisionist history and linguistic sophistry to avoid awards they deem unduly punitive.

This case is a classic example. The highest rate of wages in the port of engagement is that of CHLOE Z's most

senior seaman, the "fish captain."[5/] Applying this seaman's rate of wages as the §11107 benchmark results in awards to a few crewmen of up to 8 times oral wages, and for smaller multiples to crewmen with higher oral rates (the Master's oral rate, for example was $18/ton).

The Ninth Circuit strained mightily to avoid affirming these awards. It entirely avoided mention of this Court's cases on the subject, although they had been vigorously argued to be decisive by the Crew and had been found dispositive by the district court. The court also avoided relevant mention of the direct legislative history of this group of statutes, particularly the statutory predecessor which contained the phrase "highest rate of wages *paid to any seaman shipped* for the voyage" Act of July 20, 1940, C. 48 § 10, S. Stat. 395 (emphasis added). Instead the court purported to rely on "traditional maritime distinction[s]" between officers and seamen, and a requirement

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5/ The Ninth Circuit also confused the "fish captain" with the vessel's Master. 129 F.3d 338, n. 8, App. 9a. A peculiarity of the vessels of the Zuanich tuna fleet was the fact that their highest paid crewmembers, the "fish captains" were neither the vessel Masters nor ships' officers. Their oral wage rate was between $39 and $40/ton. The Crew argued on summary judgment that the "fish captain" could serve as the benchmark earner for § 11107 purposes, and the district court agreed.

of "comparable ratings" into the Act.[6] 129 F.3d 1333, n. 8, App. 9a.

The Ninth Circuit's reliance on unlegislated "traditional distinctions" is indistinguishable from the Fifth Circuit's reversion to "equity" in *Griffin*. Both are illegitimate modes of statutory interpretation. The court's comments in Griffin are instructive here:

> In respondent's view, Congress could not have intended seamen to receive windfalls of this nature without regard to the equities of the case.
>
> It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. (citations omitted). In refusing to nullify statutes, however, however hard or unexpected the particular effect, this Court has said:
>
> 'Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking author-

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[6] Congress, for its part, has rejected the application of any such distinctions for purposes of applying the penalty wage laws. the term "Seaman" is governed by the "Definitions" section of Page G of Title 46. That section, 46 U.S.C. § 10101(3) clearly states that "'Seaman' means an individual (except scientific personnel, a sailing instructor, or a sailing school student) engaged or employed in *any capacity* or board a vessel." (emphasis added).

> ity, and not with the courts.' (citations omitted).

Griffin, 458 U.S. at 575.

The Court of Appeals' rudderless approach to statutory interpretation also necessarily resulted in error. The court's first error is a finding, albeit implicit, that the statute is ambiguous because "the phrase 'highest rate of wages at the port' fails to identify those whose 'highest rate of wages' is to be used as the benchmark." 129 F.3d 1333, App. 9a. Seizing on this supposed ambiguity, the Ninth Circuit erected a "straw man:" "should it be the wages earned by the highest paid person at the port, e.g., the CEO of a multinational corporation headquartered there? Should it be the wages earned by the highest paid person employed on a vessel at the port, e.g., the captain of a luxury cruise liner?" *Id.* The Ninth Circuit then attempted to solve this "problem" by reliance on the "traditional maritime distinction[s] between officers and seamen" and imposing a requirement of comparability of "rating".

Such judicial revision of a statute, particularly one written in plain English, was error and a paradigmatic example of what courts should *not* do in statutory analysis. Although it is true that the final clause of the statute does not specify a "seaman" as the benchmark earner for purposes of application of § 11107, the statute is a *seaman's* protective statute and mentions seaman *four times* within its two sentences. As this Court has previously held:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it

> would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations or a different class of beneficiaries.

Mobil Oil Corp. v. Higginbotham, 436 U.S. 617, 627 (1978). *See, also, Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (seaman's protective statute should be applied as written; the court may not exercise discretion that Congress did not provide).

The identical issue was argued in the *Larry Z* case, *supra*, to the Southern District of California. The United States, mortgagee of that vessel, asked the court to declare by way of partial summary judgment that § 11107's remedy was limited to "similarly situated seaman." The court denied the motion, agreeing with the analysis of the Guam district court. The district court's analysis is instructive:

> The first step in any statutory interpretation is an examination of the plain meaning of the statute at issue. (Citation omitted.) Although the crew argued and the CHLOE Z court held, that the plain meaning of the 'highest rate of wages' language "settles the issue." *CHLOE Z* slip op. at 8, the court recognizes some ambiguity on this issue. While it is true that the United States' interpretation of the statute requires the adoption of a judicially modifying clause (limiting the remedy to 'similarly situated seamen'), so too the crew's approach asks the court to assume that the 'highest rate of wages' means the 'highest rate of wages *of a seaman*.' Nonetheless, in the context of the statute and its

> history, the crew's interpretation demands only a slight inferential leap. First and most obviously, one can presume that reference to 'wages' in the admiralty statute involves the wages of seamen. Second, § 11107 must be read in light of the history of that provision.

App. E, 57a. The district court then quoted from the original 1840 statute which provided in relevant part:

> [A]nd any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to *any seaman* shipped for the voyage or the sum agreed to be given him at his shipment.

The district court therefore concluded:

> It seems clear that, at the very least, the 'wages' referred to in § 11107 must be limited to the wages of seamen.

The Southern District then pointed out that nothing in the protective scheme in which § 11107 is integral limits the wages to comparable or similarly situated seamen. Furthermore, the court noted that there was no legislative history supporting such a limitation, and viewing the admiralty statutes as a whole, the Congressional silence was "quite telling."

There is no evidence of Congressional intent to limit remedies available to seamen under § 11107. In several instances, Congress has expressly narrowed the scope of similar "highest rate of wage" remedies. Section 7113 of Title 46, for example, entitles those performing certain duties to the United

States government in time of war "to the highest rate of wages in the Merchant Marine of the United States *for similar services*." *Id.* (emphasis added). Another example is 46 U.S.C. § 10508 (applicable to coastwise voyages) which gives wrongfully employed seamen the opportunity to recover "the highest wage that was paid for *a similar voyage* within the three months before the time of engagement at the port or place at which the seaman was engaged. *Id.* (emphasis added).

V.

THE NINTH CIRCUIT'S JUDICIAL REVISION OF § 11107 IS CONTRARY TO THE MANIFEST PURPOSES OF FEDERAL LEGISLATION REQUIRING SEAMEN'S ARTICLES AND PAYMENT OF WAGES.

The overall design and evolution of the federal statutes mandating the provision of written articles and the prompt payment of seamen's wages, as well as the historic national policies animating those laws, argue strongly in favor of applying § 11107 as written. Seamen are, and have for centuries been, perhaps the most protected class of workers in the world. In the United States, federal legislation affects virtually every aspect of a seaman's personal safety, comfort, health and employment, and nowhere is a seaman afforded more statutory protections than in the area of written employment agreements and wage payments. *See, Kossick v. United Fruit Co.*, 365 U.S. 731, 734 n.4 (1961). *See, also*, 1B BENEDICT ON ADMIRALTY, § 63, 7th Ed. (1994). Seamen's wages are afforded the highest priority lien against the vessel (46 U.S.C. §§ 31301, et seq.), they are protected from attachment, assignment or sale (46 U.S.C. §§ 11109, 11111), they cannot be withheld to pay state taxes (46 U.S.C. §§ 11108) and are not subject to setoff unless

expressly authorized by statute *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 781-782 (1952).

Congress has been enacting, modifying, strengthening and reorganizing seamen's protection and relief laws for centuries, but the general purposes of such laws has remained the same—to safeguard the rights of seamen and to protect them from the exploitation and mistreatment to which seamen as a class are particularly vulnerable given their characteristic qualities and the general nature of the maritime enterprise. This Court has repeatedly proclaimed that such remedial legislation must be liberally interpreted in favor of seamen. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-735 (1943); *Warner v. Goltra*, 293 U.S. 155, 162 (1934). Enforcement of the plain language of § 11107 as provided for by Congress advances the manifest purposes of the federal legislation mandating written fishing agreements and payment of wages. The Ninth Circuit's flawed and unauthorized revision of § 11107 would, if given effect, seriously undermine and compromise the objectives and protections of these laws.

A. If an Unlegislated Restrictive Qualification of "Comparability" is Given Effect, § 10601's Requirement that Written Agreements be Provided to Fishermen Would be Meaningless.

Federal policy in this country has long required written contracts for hire of seamen. *See, Seattle-First v. Conaway*, 98 F.3d at 1196. Some of the very first statutes enacted by Congress mandated written articles for seamen. *See*, Act of July 1790 (1 Stat. 131) [written articles required for merchant seamen on foreign/intercoastal voyages and coastal voyages]; *see, also*, Act of February 16, 1792 (1 Stat. 229) [written

fishing agreements required for cod fisheries]. The written fishing agreement requirement was extended to the country's mackerel fisheries by the Act of March 3, 1865 (13 Stat. 535). Other commercial fisheries gained the legal protection of the written fishing agreement requirement when § 10601 was passed in 1988.[2/]

The general purpose of requiring written contracts for seamen is for protection of seamen who, as here, are otherwise subject to harsh treatment and deception. *Young v. Steamship Co.*, 105 U.S. 41, 43-44 (1881); *Seattle-First v. Conaway*, 98 F.3d at 1199, n. 2. [written agreements designed to protect "seamen from the duress, coercion or deception that might result if masters were permitted to ship them out to sea without first providing written articles"]. As such, the writing requirements set forth in § 10601, and its remedial counterpart § 11107, must be interpreted consistently with the general purposes of the legislation—protecting seamen. *See, e.g., Key Bank of Washington v. SOUTHERN COMFORT*, 106 F.3d 1441, 1443 (9th Cir. 1997) [¶ 10601 should not be interpreted to "work against the group [seamen] it was meant to protect"]. Indeed, ¶ 11107 is part of Chapter 111 of Part G of Title 46, entitled "Protection and Relief." The beneficiaries of these protections are seamen. As so powerfully evidenced in this case, these statutes are still needed to guard against the over-

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2/ Prior to 1988, the wage and written articles legislation governing merchant seamen and cod and mackerel fishermen did not extend to any other fisheries. *See, e.g., Harrison v. THE BEVERLY LYNN*, 172 F. Supp. 719 (D. Puerto Rico 1959) (tuna fisherman); *Domenico v. Alaska Packers Ass'n.*, 112 F. 554 (N.D. Cal. 1901), reversed on other grounds, 117 F. 99 (9th Cir. 1902) [salmon fishermen]; *THE GRACE DARLING*, 10 F. Cas. 895 D. Main 1878 (porgy fishermen).

reaching and oppression of shipowners like Zuanich and unscrupulous commercial lenders like TCW.

B. The Limitation of "Comparable Ratings" Invented and Imposed by the Ninth Circuit Upon § 11107 Eviscerates Congress' Selection of Incentives and Penalties Intended to Protect Seamen.

The relationship between 46 U.S.C. § 10601 and § 11107 is a carefully thought through balance. If the shipowner complies with § 10601 and provides the required written fishing agreements, it gets the benefit of a six month statute of limitations (46 U.S.C. § 10602) and an inexpensive and reasonably expedited system of dispute resolution. After all, a seaman who claims greater compensation than that provided in the agreement, or who fails to file the claim within the statute of limitations will swiftly lose the matter by motion. The evident purpose of § 10601 is to protect fishermen by requiring written agreements and provide a means, summary in nature, to force payment of their wages in a specific amount if a shipowner fails to pay.

The district court correctly understood this balance, and observed that there would be no incentive for fishing vessel owners to comply with § 10601 if notions of "comparability" were imported into the statute:

> If the Court were to apply the limited "compensatory construction" of 11107 advanced by TCW the risk exposure of a vessel owner who fails to comply with 10601 would, due to the competitive nature of labor markets, be inconsequential. Moreover, TCW's interpretation would tend to encourage rather than deter

> vessel owners to sail without completing written agreements as the potential gains made through retaining the ability to alter wages throughout a voyage would outweigh any possible penalty.

Appendix at 28a, 1997 A.M.C. at 1384.

Contrast that with the Ninth Circuit's holding importing the restrictive qualification of "comparable ratings" into § 11107. A seaman whose § 10601 rights were violated and who was cheated by the shipowner would have to litigate detailed factual issues of comparability and ratings against well-financed shipowners and aggressive commercial mortgagees. How long could a seaman, characteristically living on the edge of penury, hold out under those circumstances? This is not a speculative parade of horribles. In the present case, TCW covertly sent claims agents in their employ to Croatia to encourage the Crew to fire their counsel (who had been seeking penalty wages on their behalf), and to accept unjust, lowball cash settlements directly from TCW. This skullduggery continued until it was discovered and enjoined by the district court. Additionally, the United States, who held the mortgage on four other of the vessels of the same Zuanich fleet, attempted to obtain "releases" from the desperate crews of those vessels by paying only *85%* of the illegal oral wage rate. Unless this Court accepts the case and sets matters right, seamen of the American commercial fishing fleet will be subject to such oppression and overreaching. After all, if shipowners are better off violating the law than obeying it, one must assume that they will act accordingly.

Contrast the method of calculations and incentives under § 11107 as given by Congress. Under the plain language of the statute, the "highest rate of wages" is objectively determined

and easily calculated. An aggrieved seaman need only put forward the wage rate of any seaman in the port of engagement and use that seaman's rate of wages as the benchmark for his penalty wage claim. Lower rates of wages would be irrelevant, and higher rates of wages would never be proffered by the shipowner in opposition. The seaman would not have to wait years to recover the money due him, nor litigate through complex issues of "similar ratings" and "comparable duties," terms which may not have a settled meaning. Under the Ninth Circuit's flawed approach, seamen would necessarily be forced to settle their wage claims for the amount of their oral wages or even less, as the actions of the United States with respect to four other Zuanich vessels' seamen demonstrates. It would be all but impossible for a seaman to successfully maintain an action simply to recover the highest market rate for their "comparable rating," assuming a lawyer could be found willing to take such a case.

The Ninth Circuit's regressive interpretation of § 11107 would also result in fishermen not being made whole. If a fisherman's total recovery under § 11107 amounted to the highest market rate for the "fisherman's comparable rating" it would merely approximate his oral wages because of the competitive wages in the commercial fishing industry. After deductions for attorney's fees, court costs and other expenses, a seaman would end up with significantly less than oral wages.

Forcing seamen to litigate factual issues through years of prolonged litigation and appeals thwarts the general objective of protecting seamen from employer exploitation and mistreatment. Vessel owners, mortgagees and other business interests have substantial resources and are sophisticated in commercial and legal dealings. Delays in dispute resolution work to their advantage. They profit from seamen's penury and the threat of

lengthy litigation when negotiating settlements. As mentioned above, this is precisely the dynamic which occurred in this case and with the vessels mortgaged to the United States, in which the seamen were urged to settle their substantial wage claims "for a pittance of ready money." *See, THE SARA JANE*, 21 F. Cas. 449, 459 (S.D.N.Y. 1833). The perverse incentives created by the Ninth Circuit's misinterpretation of the statute subverts "general [Congressional] policy of assuring the fair treatment of seamen by their [employers] recognized by the Ninth Circuit itself in *Seattle-First v. Conaway*, 98 F.3d at 1198.

VI.

CONCLUSION.

The Ninth Circuit's decision in this case is more than just a bad decision affecting the Crew of CHLOE Z. Nor is its impact limited to the claims and lawsuits of the 11 other crews cheated by Zuanich and subsequently preyed upon by his mortgagees. Far more is involved.

The hardships and dangers of a seaman's life and the oppression of seamen by shipowners are present fact, not historical legend. They form the enduring basis for the powerful statutory protections which are so central to this country's maritime law. Those statutes have one common purpose: to eliminate that overreaching and oppression by providing clear rules for the engagement, termination and working conditions of seamen and swift, simple and punitive remedies against shipowners for violations of those rules.

Congress has evidenced the clarity of that purpose by two hundred years of statutory development. Indeed, Congress

only 15 years ago reenacted all of these protective statutes and took the trouble to insist in its legislative comments that the statutes be literally applied. That Congressional command has always been given proper effect in the cases of this Court. *Griffin, Isbrandtsen, Aguilar* and *Warner* are all testaments to the willingness of the court to resolve these important cases.

This, too, is a case which should be resolved *now* by the court. It is about more than the mere calculation of the remedy provided by §11107. The case presents the question of whether Congress' command that fishermen be provided written agreements, like all other seamen, will be given effect. The answer to that question will be *"no"* if the lower courts are free to judicially rewrite the remedy provided by Congress because they think it is too harsh to shipowners or too generous to certain seamen. Congress has required (and with good cause as this case so tragically demonstrates) that powerful coercive measures are necessary to deter illegal engagements of seamen.

It is unfortunate that this Petition has become necessary. This Court has provided decades of clear guidance with respect to seaman's protective legislation which boils down to a simple principle: apply the statute as written. The Ninth Circuit has refused to do so without even an acknowledgment that this Court has ever addressed the subject. Given the importance of

this area of law—to seamen, to Congress, and to the uniformity of admiralty—this error must be corrected here and now if it is ever to be addressed at all.

Dated: April 24, 1998

Respectfully submitted,

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APPENDIX A — NINTH CIRCUIT COURT OF APPEALS ORDER AND OPINION WITH RESPECT TO DISTRICT COURT OPINION, FILED DECEMBER 5, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TCW SPECIAL CREDITS, *Plaintiff-Appellant*	)	
v.	)	No. 97-15726
CHLOE Z FISHING COMPANY, INC., *Defendant,*	)	D.C. No. CV 96-00055
v.	)	
JUAN BARANDIARAN, ALFRED CANEPA, VJEKOSLAV GOBIN, JERKO KURTIN, MILARAD BEADER, DANI BLASLOV, BORIS GOBIN, IVICA GOBIN, STIVEN GOBIN, DAMIR KONCURAT, ZORAN KURTIN, OLIVER SVORCINA, NEJDELKO VITLOV, ERNES GOBIN, DRAGAN BLASLOV, DRAGAN LONGIN, AND NIKSA ZLENCIC, *Plaintiffs-in-Intervention.*	)	

Appendix A

Appeal from the United States District Court
for the Territory of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted
November 3, 1997—Guam

Decided December 5, 1997

Before: Reinhardt, Leavy, and Thomas, Circuit Judges.

Opinion by Judge Leavy, Senior Circuit Judge

In this action, the holder of a preferred ship mortgage caused a tuna fishing boat to be arrested and sold. Former crewmen then intervened to assert damage claims for unpaid wages, arguing that because no written employment agreement had been provided, they were entitled under federal statutory law to be paid at the same rate as the captain of the vessel. The district court entered summary judgment in favor of the wage claimants, and the mortgagee has appealed. We reverse and remand.[1/]

FACTS AND PRIOR PROCEEDINGS

[1/] By separate order we dismissed for want of appellate jurisdiction the related appeal in *TCW Special Credits v. CHLOE Z Fishing Co., Inc.*, No. 97-15725.

Appendix A

The F/V CHLOE Z is an American-flagged tuna purse seine boat[2/] that operates out of ports in the Western Pacific Ocean. The CHLOE Z was formerly owned and operated by the CHLOE Z Fishing Company, Inc. ("CZFC"), a single-asset Northern Mariana Islands corporation.

The CHLOE Z generally carried a crew of seventeen, consisting of a fish captain, chief engineer, navigator (master), assistant engineer, helicopter pilot, deck boss, cook, skiff driver, speed boat driver, and eight deck hands (e.g., oilers and net stackers). Typical of the industry, individual crew members of the CHLOE Z were paid a rate, known in the industry as a "lay share," in lieu of wages. A crewman's rate of compensation is determined by his rank, job classification, duties and ability. The rate is then multiplied by the adjusted tonnage[3/] of fish caught. The rate typically ranges from a low of $5 per adjusted ton for an ordinary seaman to a high of $40 per adjusted ton for the fish captain.

2/ A purse seine is a large net between 250 and 400 yards in length and some 18 to 20 yards in depth. The top of the net is supported by floats, while the bottom is weighted with brass rings through which a purse line passes. The net is first drawn around a school of fish, creating a huge circle open at both the top and bottom. Once the two ends of the net have been linked, the bottom ends of the net are drawn together, creating a giant basket. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2018 (2d ed.1960).

3/ "Adjusted tonnage" is the gross tonnage of fish caught and offloaded, adjusted for species and size, less cannery rejects.

Appendix A

In June 1995, TCW Special Credits ("TCW"), a California general partnership, acquired CZFC's preferred ship mortgage on the CHLOE Z. By the following summer, CZFC was in serious financial straits: it had not paid the crew of the CHLOE Z for either of the last two voyages, and was behind in its mortgage payments to TCW. On July 5, 1996, TCW filed an action *in personam* against CZFC and *in rem* against the CHLOE Z in the District Court of Guam. The vessel was arrested and sold at a Marshal's auction. The proceeds of the sale were deposited in the court's registry.

Twenty-one[4/] former crewmen of the CHLOE Z filed a complaint in intervention in TCW's action, asserting *in personam* claims against CZFC and *in rem* claims against the CHLOE Z for unpaid wages. The complainants alleged that the defendants had not only failed to pay them their agreed upon wages, but had also failed to provide the former crewmen with written contracts of employment, and this latter failure entitled the complainants to "penalty wages" at the rate the captain was paid. The district court agreed with the former crewmen and

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4/ We note—without attempting to resolve—the parties' dispute over the correct number of appellees. TCW argues that there are thirteen appellees, because eight of the original twenty-one complainants settled and assigned their claims to TCW. Opposing counsel insist that there are nineteen appellees, because six of the settlements were invalid and unenforceable.

granted their motion for summary judgment. TCW has timely appealed from that decision.[5]

ANALYSIS

Discussion

[1] [2] The gist of the appellees' claim for damages is that CZFC violated 46 U.S.C. § 10601 by failing to provide the crewmen of the CHLOE Z with written fishing agreements, and this violation entitles them to recover damages on their unpaid wage claims in the form of penalty wages equal to the lay share due the CHLOE Z's fish captain. While we accept the first half of this argument, we must reject the second half.

Unlike merchant seamen, who have long enjoyed the special protection of courts and Congress, American fishermen (other than those employed in the cod and mackerel fishing industries) have not been the subject of much federal legislative concern throughout most of our nation's history.[6] This state of

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[5] TCW appealed rather than CZFC and/or the CHLOE Z because the effect of the district court's ruling was to establish a larger than anticipated wage lien enforceable against the proceeds of the vessel's sale, thereby reducing the amount of money available to TCW as the preferred mortgagee. *See United States v. ZP Chandon*, 889 F.2d 233, 237 (9th Cir. 1989) (claim for unpaid seamen's wages gives rise to maritime lien having priority over preferred ship mortgage lien).

[6] *See, e.g.*, former 46 U.S.C. § 604 *(repealed by* Pub.L. No. 98-89, § 4(b), 97 Stat. 500, 600 (1983)), which expressly denied to crewmen on fishing vessels the right to proceed *in rem* on a libel for unpaid wages.

affairs changed, however, with the recent passage of the Commercial Fishing Industry Vessel Safety Act of 1988 (the "Act"), Pub.L. No. 100-424, 102 Stat. 1585 (Sept. 9, 1988) (codified at various places throughout Title 46 and 46 Appendix, United States Code).

Prior to 1988, American fishermen not engaged in the cod and mackerel fisheries did not ordinarily sign shipping articles, but entered into fishing employment agreements that were generally informal and often oral. Section 6(a) of the Act, codified at 46 U.S.C. §§ 10601--10603, was designed to change this practice:

> (a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel . . . shall make an [sic] fishing agreement in writing with each seaman employed on board if the vessel is-
>
> (1) at least 20 gross tons . . .; and
>
> (2) on a voyage from a port in the United States.
>
> (b) The agreement shall be signed also by the owner of the vessel.
>
> (c) The agreement shall-
>
> (1) state the period of effectiveness of the agreement;
>
> (2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which

the vessel will be engaged during the period of the agreement; and

(3) include other agreed terms.

Appendix A

46 U.S.C. § 10601 (in relevant part).[1/] "When fish caught under an agreement under section 10601 . . . are delivered to the owner of the vessel for processing and are sold,

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1/ Section 10601's predecessor statute, former 46 U.S.C. § 531, read as follows:

> The master of any vessel . . . carrying on the bank and other cod fisheries, or the mackerel fishery . . . shall, before proceeding on such fishing voyage, make an agreement in writing with every fisherman who may be employed therein[.] . . . Such agreement shall be indorsed or countersigned by the owner of such fishing vessel or his agent.

46 U.S.C. § 531 (*repealed by* Pub.L. No. 100-424, § 6(c), 102 Stat. 1585, 1592 (1988)).

> Section 531 was part of Chapter 17, "Regulation of Fishing Voyages," and was separate from Chapter 18, "Merchant Seamen," of Title 46. Moreover, section 531 was itself the codification of R.S. 4391 (1878), which was derived from two nineteenth century statutes designed to protect cod and mackerel fishermen, not seamen: the Acts of June 19, 1813 (ch. 2, § 1, 3 Stat. 2) and of March 3, 1865 (ch. 117, 13 Stat. 535).
>
> While section 531 maintained the historically recognized distinction under maritime law between fishermen and seamen, section 10601 does not. For example, section 10601 identifies fishermen as "seamen" and was inserted into Subtitle II, Part G ("Merchant Seaman Protection and Relief") of Title 46, rather than segregated into a separate fisheries chapter, like section 531. *See also* 46 U.S.C. § 10101(3) (" 'seaman' means an individual . . . engaged or employed in any capacity on board a vessel.").

the vessel is liable in rem for the wages and shares of the proceeds of the seamen." 46 U.S.C. § 10602(a).

[3] Fishermen hired without articles, contrary to the provisions of section 10601, may avail themselves of the protection afforded seamen by 46 U.S.C. § 11107. *Seattle-First Nat'l Bank v. Conaway,* 98 F.3d 1195, 1198 (9th Cir.1996); *Bjornsson v. U.S. Dominator, Inc.,* 863 P.2d 235, 238-40 (Alaska 1993). That statute provides:

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.
>
> **46 U.S.C. § 11107.**

The appellees contend that section 11107 is unambiguous and allows a wronged seaman to recover penalty wages equal to those of the highest paid seaman—regardless of rating—at the port of hire, *e.g.,* the fish captain. TCW argues that section 11107 is ambiguous, and that a review of the statute's history and prior case law shows that a wronged seaman is entitled to recover wages equal to the higher of either his orally agreed upon wages or those wages a seaman of equal rating could command at the same port of hire. The United States as *amicus curiae* insists that, while the statute is not ambiguous, it must be interpreted in the light of its predecessor and related statutes, none of which would support the reading advanced by the appellees.

Appendix A

We note at the outset at least three problems with the position advanced by the appellees. First, the phrase, "highest rate of wages at the port" fails to identify *whose* "highest rate of wages" is to be used as the benchmark. Should it be the wages earned by the highest paid person at the port, *e.g.*, the CEO of a multinational corporation headquartered there? Should it be the wages earned by the highest paid person employed on a vessel at the port, *e.g.*, the captain of a luxury cruise liner? Should it be the wages earned by the highest paid person connected with the CHLOE Z, *e.g.*, the CHLOE Z's fish captain?

Second, adopting the appellees' interpretation would have the effect of rendering superfluous the words, "rate of wages." While seamen have ratings (e.g., ordinary, able bodied, etc.), and are paid flat wages based thereon, most non-seamen are simply paid wages, and not a "rate of wages" which is the rate, based on a seaman's rating, to be applied to the adjusted tonnage of fish caught on the voyage.[8/]

Third, adopting the appellees' interpretation would also have the effect of rendering superfluous the statute's final phrase, "whichever is higher." If "highest rate of wages at the port" means "highest rate of wages at the port paid to any seaman, regardless of his job description," that rate would, by

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[8/] Hence the traditional maritime distinction between officers (e.g., the master, first mate, etc.) and *ratings* or seamen (i.e., those below the rank of officer). A failure to acknowledge this point leads to the absurdity of the master of the CHLOE Z (i.e., the fish captain) violating federal law by failing to have himself sign a fishing agreement with himself. *See* 46 U.S.C. § 10601(a).

its very definition, always be as high as or higher than "the amount agreed to be given the seaman at the time of engagement."

In light of the above, it would appear that the only logical and internally consistent reading of the statute is the one urged by both TCW and the United States: a wronged seaman is entitled to recover the higher of either the wages he orally agreed to, or the highest rate of wages that could be earned by a seaman at the port of hire *who has the same rating* as the complainant.

An examination of the history of 46 U.S.C. § 11107 supports this interpretation. Section 11107 is the 1983 reenact ment and recodification of former 46 U.S.C. § 578. That statute read,

> All shipments of seamen made contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

46 U.S.C. § 578 (*repealed by* Pub.L. No. 98-89, § 4(b), 97 Stat. 500, 600 (1983)).

Section 578 was itself the 1928 codification of R.S. 4523 (1878), which was in turn a revised (1872) version of ch. 48, 5 Stat. 394, known as the Act of July 20, 1840. The language of the 1840 Act was almost identical to that of its successor statutes:

Appendix A

> All shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void; and any seamen so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

5 Stat. at 395. *See also the Lily*, 69 F.2d 898, 898-99 (9th Cir.1934) (tracing the history of related statutes).

Cases construing the predecessor statutes of 46 U.S.C. § 11107 consistently held that a seaman's "highest rate of wages" was to be measured against seamen with the same rating or similar duties. *See, e.g., Lent Traffic Co. v. Gould*, 2 F.2d 554, 556-57 (3d Cir.1924) (river pilot); *the Elihu Thompson*, 139 F. 89, 93 (W.D.Wash. 1905) (ordinary seamen); *the Pacific*, 23 F. 154, 155 (W.D.Pa. 1885) (deckhand). Cases construing similar statutes reached the same results. *See, e.g., the James H. Shrigley*, 50 F. 287, 288 (N.D.N.Y. 1892) (interpreting R.S. 4520 and 4521,[2/] applicable to coastwise seamen, as requiring comparable wages for wife of cook as "second cook"); *the Australia*, 2 F.Cas. 236, 237-38 (D.Me. 1859) (No. 667) (interpreting predecessor of R.S. 4521 as requiring "highest wages" for a cook). Finally, cases applying general maritime law principles also reached the same results. *See, e.g., the Topsy*, 44 F. 631, 633 (D.S.C. 1890) (seaman without articles paid quantum meruit and allowed to leave

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2/ Those statutes were subsequently codified at 46 U.S.C. §§ 574 and 575, respectively. Sections 574 and 575 were repealed by Pub.L. No. 98-89, § 4(b), 97 Stat. 600, 602 (1983), and now appear, in relevant part, at 46 U.S.C. §§ 10502(a) and 10508(a), (b).

vessel); *the Acorn*, 15 F. 751, 752 (W.D.Pa. 1883) (mariners to be paid "at the rate paid by other like vessels leaving the same port at the same time on the like voyage"); *Rollins v. E O Stanard*, 4 F. 750, 751 (E.D.Mo. 1880) (mariner entitled to compensation at rate for same "class[ ] of service"; i.e., $5 more per month than that paid to "roustabouts").

[4] In light of the above, we conclude that section 11107 is properly construed as having the following effect. It (1) renders void an oral contract entered into in violation of section 10601; (2) permits the wronged seaman to leave the service of the vessel without being declared a deserter; and (3) entitles the wronged seaman to recover either his promised wages or the highest rate of wages of a seaman of comparable rating at the port from which he was engaged, whichever is higher. Accordingly, the decision of the district court must be reversed and the case remanded for a determination of the amounts due the various complainants. *See supra* note 4.

REVERSED and REMANDED for further proceedings.

APPENDIX B — UNITED STATES DISTRICT COURT, TERRITORY OF GUAM, MEMORANDUM ORDER MARCH 6, 1997

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
TERRITORY OF GUAM

TCW SPECIAL CREDITS, et al., Plaintiffs,

v.

F/V CHLOE Z, her engines, tackle, apparel, and furniture, et al., Defendants.

No. CV 96-00055.

March 6, 1997.

Carlsmith, Ball, Wichman, Case & Ichiki, Agana, Guam, for Defendant, CHLOE Z Fishing Company, Inc.

Jean Melancon, McCully, Lannen, Beggs & Melancon, P.C., Maite, Guam, for Plaintiffs-in-Intervention, Robert, Matos and Slobodan Pranjic.

D. Paul Vernier, Agana, Guam, Craig Miller, Richard Schroeder, Davis Wright Tremaine Seattle, Washington, for Plaintiff TCW Special Credits.

Appendix B

Cesar C. Cabot, Law Office of Cabot & Mantanona, Tamuning, Guam, William L. Banning, Kurt L. Micklow, Rice, Fowler, Booth & Banning, San Diego, CA, for Plaintiff-in-Intervention Juan Barandiaran, et al.

G. Patrick Civille, Ching, Boertzel, Dooley, Civille, Roberts, Calvo & Keeler, Agana, Guam, for Claimants Starkist Caribe, Inc. and Star Kist Foods, INC.

George M. Butler, Agana, Guam, William O. Dougherty Frederick M. Dudek, Dougherty & Hildre, San Diego, CA, for Plaintiff-in-Intervention Vjeko Mazic.

Steven A. Zamsky, Agana, Guam, for Plaintiff-in-Intervention Shell Guam, Inc.

Anita P. Arriola, Arriola, Cowan and Arriola, Agana, Guam, for Defendant Sphere Drake Underwriting MGMT. LTD.

MEMORANDUM ORDER

UNPINGCO, District Judge.

This matter is before this Court on Plaintiff-in-Intervention Juan Barandiaran, et al. ("Crew-members") Motion for Summary Judgment and Plaintiff TCW Special Credits ("TCW") Cross-Motion for Summary Judgment. A Motion Hearing was held on January 17, 1997. This Court has reviewed the parties submitted papers and controlling legal authority; as well as, considered the parties arguments set out at the motion

hearing. For the reasons that follow the Crewmembers' Motion for Summary Judgment is GRANTED in Part and DENIED in part; TCW's Cross-Motion for Summary Judgment is DENIED.

A. BACKGROUND

TCW filed the above captioned-case in personam and in rem seeking to foreclose its preferred maritime mortgage against the F/V CHLOE Z ("CHLOE Z"), a U.S. flagged fishing vessel. The CHLOE Z is a 235 foot, steel-hulled tuna purse seiner built in 1988. This vessel was arrested on July 5, 1996. Following CHLOE Z's arrest several additional plaintiffs entered this action, among these intervening plaintiffs was a group of former crew-members, Plaintiffs-in- Intervention Barandiaran et al. (the "crewmembers").

The basis of the crewmembers' cause of action in this case is past wages due under 46 U.S.C. §§ 10601 and 11107. Specifically, during various fishing voyages (CHLOE Z Trips 24-29) these seamen were employed solely on the basis of oral agreements. No written agree-ments were entered into by the crew and the vessel owners. To differing degrees these crewmembers were not compensated for these final voyages of the CHLOE Z. Accordingly, these crewmembers intervened in this action; and subsequently, moved for summary judgment with regard to their wage claims due under § 11107. It is this motion which is currently before the Court.

Appendix B

B. SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment:

> [s]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). Summary judgment is only appropriate if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).

In evaluating a Rule 56 motion courts must view the evidence in the light most favorable to the non-moving party; if direct evidence as to material facts conflicts, summary judgment must be denied. *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A material fact is one that is relevant to the claim or defense at issue and will effect the outcome of the suit; disputes over unneces-

sary immaterial facts will not preclude summary judgment. *Anderson*, 477 U.S. at 248. The initial burden, under Rule 56, belongs to the moving party to establish by identifying those materials on file that demonstrates the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 331-332. Then the burden shifts to the nonmoving party, who—"must do more than simply show that there is some metaphysical doubt as to the material facts." *Anderson*, 477 U.S. at 248. Where the moving party meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment—the burden of persuasion shifts to the non-moving party. *First National Bank of Arizona v. Cities Services, Co.*, 391 U.S. 253, 290, n. 19, 88 S. Ct. 1575 (1968). "The moving party is 'entitled to a judgment as a matter of law' (if) the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

Consequently, in opposing a summary judgment motion the nonmoving party must, after the moving party has made a prima facie showing of entitlement to summary judgment, come forward with competent evidence through which a jury could find in his favor; the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Id.* Additionally, the non-moving party must support the existence of specific factual showings with references to the record. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana*

Hydrolec, 854 F.2d 1538 (9th Cir. 1988). In short, diligence in opposing a summary judgment motion is required. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 937 (5th Cir. 1967).

C. ANALYSIS

The summary judgment question presented in this case is whether a genuine issue of material fact exists as to the crewmembers' demand, under 46 U.S.C. §§ 10601 and 11107, for wages due. To prevail on this motion the crewmembers must demonstrate that no genuine or material factual dispute exists as to their entitlement to these wages. In their motions the parties raise several independent issues, each of these issues will be addressed separately.

1. Statutory Interpretation of 46 U.S.C. § 11107.

There is no dispute that the central issue brought by these motions is the interpretation of 46 U.S.C. § 11107. The question presented is what remedy is due a seaman under § 11107 where 46 U.S.C. 10601 has been violated. This determination is clearly a matter of statutory construction. It is well- recognized that statutory interpretation is a question of law. *Van Der Salm Bulb Farms, Inc. v. Hapag*, 818 F.2d 699 (9th Cir. 1987), citing, *Trustees of Amalgamated Ins. Fund v. Geltman Ind.*, 784 F.2d 926, 929 (9th Cir. 1986). And therefore, questions of statutory interpretation are properly resolved by summary judgment. *Van Der Salm Bulb Farms, Inc. v. Hapag*, 818 F.2d 699

(9th Cir. 1987), citing, *Schlothan v. Territory of Alaska*, 276 F.2d 806, 815 (9th Cir. 1960).

The statutory interpretation question raised in this matter arises from the enaction of specific federal legislation regarding employment agreements in the commercial fishing industry. Under federal law there is a specific regime for recovery of wages due mariners serving aboard fishing vessels. Two principal statutes, 46 U.S.C. §§ 10601 and 11107 set out the basic framework of this wage recovery system.

Title 46 U.S.C. 10601[1/] requires, in pertinent part, that "[b]efore proceeding on a voyage, the master or individual in charge . . . shall make an [sic] fishing agreement in writing with each seaman employed on board." The section also prescribes the content of the written agreement and requires that it be signed by the owner of the vessel. 46 U.S.C. § 10601(b), (c). Additional legislation in this area, 46 U.S.C. 11107,[2/] provides

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1/ 46 U.S.C. § 10601. Fishing agreements.

(a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel, fish processing vessel, or fish tender vessel shall make an fishing agreement in writing with each seaman employed on board if the vessel is—(1) at least 20 gross tons; and (2) on a voyage from a port in the United States.

2/ 46 U.S.C. § 11107. Unlawful engagements void.

An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate

that a seaman employed in a manner "contrary to a law of the United States . . . may leave the service of the vessel . . . and . . . recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher." Viewed together § 10601(a) and § 11107 mandate that: (1) fishing agreements with seamen be in writing; (2) a master who hires a seaman on an oral contract violates that law and consequently such oral agreements are void; and, (3) where 10601 is violated the seaman is entitled to the remedies set forth in § 11107. *Seattle-First National Bank v. Conaway*, 98 F.3d 1195 (9th Cir. 1996); see also *Bjornsson v. U.S. Dominator, Inc.*, 863 P.2d 235, 238-40 (Alaska 1993) (the Alaska Supreme Court held section 11107 provides for a penalty against vessel owners who employ seamen without written agreements in violation of section 10601).

In this case there is no dispute that this federal legislation controls. Nor is there any dispute that, as held in both the *Seattle-First* and *Bjornsson* cases, that the legislation in this area provides that a seaman employed in a manner contrary to section 10601 is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher. 46 U.S.C. § 11107; *see also* 46 U.S.C. § 10508. In this regard both TCW and the Crewmembers concur. Further-

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of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

more, both parties agree that in this case no written fishing agreements were made and thus section 10601 has been violated—triggering the remedial power of section 11107. However, the parties contest the scope of the remedy provided for under section 11107. And by way of motion and cross-motion for summary judgment both parties have requested this Court interpret the required remedy under this statute.

A court's role in applying and interpreting statutes is not always clearly defined by the language of a given statute. This problem is attributable both to the imprecision of language and the inability of statutory drafters to fully anticipate the potential circumstances that may arise in a statute's application. These problems coupled with the increased level of federal legislation in our nation has created a greater role for federal courts in interpreting statutory law. With this increased role courts and academics have developed several different theoretical approaches to interpreting statutory language. Two of the more traditional approaches—(1) the strict textualist approach and (2) the more contextual, attribution of purpose approach—have been advanced by the parties in this case. As discussed below, this Court finds that whether one views section 11107 through a strict textual or a more contextual purpose-based approach the outcome is the same. Within section 11107, the term "highest rate of wages" means just that—the highest rate of wages available at that port for any seaman regardless of his specific duties or job description.

Appendix B

(a) Plain Meaning Approach

The language of section 11107 provides that the seaman is "entitled to recover **the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement**, whichever is higher." (emphasis added). The parties specifically contest the proper interpretation of the "highest rate of wages" language set forth in this statute. TCW contends that this wage rate is limited to the highest rate of wages paid to a seaman performing similar duties. Therefore, under TCW's view, the "highest rate of wages" language allows a vessel's oiler, engineer, deckhand, navigator or cook to claim the highest wage (at the port of engagement) of a similarly situated oiler, engineer, deckhand, navigator or cook. Thereby limiting the scope of the "highest rate" to that appropriate for any given seaman's rank and classification. In support of this position TCW relies on several 19th century district court opinions[3/] applying a similar penalty wage statute and several "policy" reasons. In contrast, the crewmembers argue that the plain text of the statute controls and therefore where section 11107 is triggered the injured seaman is entitled to **"the highest rate of wages at the port from which the seaman was engaged."**

3/ These cases are not persuasive. First, they involved the application of a separate statute. Second, none of these cases offered a definitive definition or reasoned analysis of the "highest rate of wages" language. And lastly, as demonstrated by a comparison of TCW and the crewmembers' memoranda these cases appear, in application, to cut both ways.

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At the outset, the Court notes for the record that neither of the parties have presented the Court[4/] with any case law directly interpreting the "highest rate of wages" language of section 11107 or any other similar language in earlier seaman penalty wage statutes. Accordingly, this issue appears to be a matter of first impression. Furthermore, at motion argument both parties conceded that the legislative history regarding this matter failed to address this issue or offer any extrinsic aids to assist the Court in its analysis. It is from this background that the Court approached its evaluation of section 11107.

The plain textualist approach advanced by the crewmembers is, in this case, quite persuasive. A textualist approach posits that most cases can be resolved by a simple reading of the statute and application of either the plain or most likely meaning of a word/phrase to answer any dispute as to the meaning. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S. Ct. 3245 (1982); *TVA v. Hill*, 437 U.S. 153, 98 S. Ct. 2279 (1978). The *Griffin* case is very applicable in this case. Not only does *Griffin* provide an accurate evaluation of a well accepted approach to statutory construction it also provides a strong analogy—for *Griffin* involves the interpretation of a penalty wage statute in the maritime context. The *Griffin* Court, in interpreting the language of 46 U.S.C. § 596, a seaman penalty wage statute, held that: "Our task is to give effect to the will of Congress, and where its will has

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4/ Furthermore, this Court's independent research was unable to find any judicial interpretation or legislative history interpreting this language.

been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin*, 458 U.S. at 570, *quoting*, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051 (1980).

When interpreting a statute the starting point is the statute and plain language of the statute itself. *Id.* And, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268-1269 (9th Cir. 1990). If the language at issue has a settled meaning, it is inferred that the legislature meant to incorporate the established meaning, unless the statute dictates otherwise. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534 (1982) ("As in all cases involving statutory construction, . . . we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'") (*quoting Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585 (1962)).

Here, the plain meaning of the term "highest rate of wages" settles the issue. The language of the statute is clear and no contrary legislative purpose has been expressed. The statute plainly states that under § 11107 the wage entitlement is the higher of "the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement." Nothing in the language of the statute, or the legislative history, authorizes any limit to a seaman's right to the "highest rate of wages" at the port. Nor does

the language or words selected by Congress imply, directly or indirectly, that this rate of wages must be limited to the rate of a similarly rated seaman. Accordingly, the plain language of section 11107 is determinative—where a vessel owner fails to comply with section 10601 the vessel's seamen are entitled to the amount agreed upon before the voyage or the highest rate of wages paid at the port of engagement.

(b) Attribution of Purpose Approach

Despite the plain language of section 11107, TCW urges that this Court adopt a narrower interpretation of the "highest rate of wages" language. Specifically, the highest rate of wages paid should be based on an evaluation of similarly situated or similarly rated seamen. The basis of TCW's position is that the purpose of the statute is compensatory not punitive and that the simple intent is to ensure that seamen are "fairly compensated." Therefore, the purpose or intent of section 11107 is to afford a remedy limited to the highest rate appropriate given an individual crewmember's position on the vessel. TCW has cited no legislative history that reveals a clear purpose on Congress' part to limit the remedial nature of 11107 to a "fair" compensation. Rather TCW appears to casts its argument in terms of its view of the general statutory purpose. Nevertheless, for the reasons discussed below, this Court finds that TCW's view that the purpose of the statute is essentially compensatory, and not punitive, is not only without support, but in error.

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The evident purpose of § 11107 is two-fold. First, as conceded by TCW, to provide the unpaid crewmembers of fishing vessels with a statutory right or remedy to recover wages for work done. And second, as recognized by the Ninth Circuit in *Seattle-First National Bank*, 98 F.3d at 1198, the purpose of § 11107 is to provide "for a penalty against vessel owners who employ seamen without written agreements in violation of § 10601." *See Bjornsson*, 863 P.2d at 238 (holding that section 11107 provides a penalty for violation of section 10601). This finding of dual purposes within a remedial penalty wage statute is consistent with the Supreme Court's holding in *Griffin* which recognized, in the context of 46 U.S.C. § 596, that despite the remedial purpose of a wage penalty statute, a statute may be constructed to secure such a remedial purpose "through the use of potentially punitive sanctions." *Griffin*, 458 U.S. at 572. Accordingly, section 11107 recovery is both compensatory, in that it provides fishermen the right to collect wages due, and penal, as it provides the possibility to recover additional sums in an effort to encourage compliance with section 10601.

The punitive nature or penalty element of 11107 is supported when the statutory scheme of sections 10601 and 11107 are viewed in the context of general maritime law. To begin, since *Harden v. Gordon*, 11 F.Cas. 480, 483-85 (C.C.D.Me. 1823) (No. 6047), it has been settled that sailors are "wards of admiralty," requiring special protection by courts and congress because they are incapable of caring for themselves or in bargaining with shipowners themselves. This traditional concern has been applied with vigor in two areas: wage payment and

requiring written articles. *Kossick v. United Fruit Co.*, 365 U.S. 731, 734 n. 4, 81 S. Ct. 886 (1961) (recognizing the long standing requirement among maritime nations that a seaman's contract of hire be in writing for the protection of the seaman); *Arguelles v. U.S. Bulk Carriers, Inc.*, 408 F.2d 1065, 1069 (4th Cir. 1969), aff'd, 400 U.S. 351, 91 S. Ct. 409 (1971) (stating "[s]ince ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them."); *see also Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240, 243 (5th Cir. 1991) (recognizing the ease with which shipowners could exploit sailors, and thus reiterated the reasons for the special protection accorded them, including the fact that "A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment."); *Brown v. Lull*, 4 F.Cas. 407, 409 (C.C.D.Mass. 1836) (No.2018) (observing that sailors' rights need zealous protection by courts because of unequal bargaining position and skill between sailors and shipowners).

This type of protection is clearly required in the highly competitive fishing industry. It is apparent that the inequality in bargaining position between fishing companies and unsophisticated fishermen/seamen is significant. Section 10601, enacted in 1988, was a legislative response designed to advance—in the commercial fishing industry—the law's preference toward "a seaman's right to a

written contract of hire." *Seattle-First National Bank*, 98 F.3d at 1196; *Bjornsson*, 863 P.2d at 238. Given the fact that section 10601 is designed to accomplish the long standing goal of protecting a seaman from employer exploitation it follows that its remedial provision (section 11107) was intended to provide a punitive element. Any alternative interpretation of this statutory scheme (§ 10601 and § 11107) fails to create the needed incentive to press vessel owners into compliance; thereby, rendering the legislative purpose behind sections 10601 and 11107 ineffective. For example, if the Court were to apply the limited "compensatory" construction of 11107 advanced by TCW the risk exposure of a vessel owner who fails to comply with 10601 would, due to the competitive nature of labor markets, be inconsequential. Moreover, TCW's interpretation would tend to encourage rather than deter vessel owners to sail without completing written agreements as the potential gains made through retaining the ability to alter wages throughout a voyage would outweigh any possible penalty. This potential encouragement is also supported by the fact that a seaman's remedy under section 11107 involves the possibility of significant delay thereby creating a clear settlement advantage to the better financed vessel owner. Therefore, in terms of creating a compliance incentive the interpretation that section 11107 provides for the possibility of significantly higher wages is more tenable. *See Trivennture Investment, Inc. v. M/V Midas et al.*, 1996 A.M.C. 424 (W.D.Wash. 1995) (stating that "A major sanction is provided by 46 U.S.C. § 11107 making oral agreements void and providing for the recovery of wages at a potentially higher rate than agreed upon") (emphasis added). Accordingly, this Court finds

that the broad interpretation of section 11107 is not only mandated by its clear language but is also consistent with the statute's purpose and general maritime law.

(c) Policy Issues

Lastly, TCW argues that there are several policy reasons supporting its interpretation: common sense; potential bankrupting affect; disproportionate penalty; and, lack of nexus between the amount of damages and the conduct being punished. These arguments, although valid, are not determinative in this case. The sum of these "policy" points is TCW's complaint that the result is absurd and is likely to be at odds with any conceivable intention of its drafters. Specifically, TCW is concerned that the literal interpretation of the "highest rate of wages" will create a significant "unearned" windfalls for certain members of the crew and excessively punish the vessel owner's conduct. This Court recognizes the maxim that "interpretations of a statute which would produce absurd results are to be avoided" however, this avoidance is applicable only where "alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575, citing, *United States v. American Trucking Assns., Inc.*, 310 U.S., at 542-543; *Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S. Ct. 337 (1940). In this case, given the lack of an alternative interpretation,[5/]

[5/] The interpretation advanced by TCW is not an acceptable alternative interpretation. It fails to advance the evident purpose of sections 10601 and 11107. As explained more fully above, if the Court attached a more

the mere fact that certain members of the crew will receive significantly larger wages than originally, albeit unlawfully, contracted for does not create an "absurd result." *See generally Griffin*, 458 U.S. at 575-576 (holding that a recovery in excess of $300,000 in a case based on an original claim of wages for $412.50 was not "absurd," based on the recognition that awards made under a penalty wage statute were not intended to be merely compensatory but also designed to protect seamen from delayed payments of wages and to prevent, by its coercive effect, a vessel owner's compliance with the law).

As clearly held in *Griffin* it is the nature of punitive remedies to create awards that "may be out of proportion to actual injury; such remedies are designed to deter particular conduct," as legislatures often find "that harsh consequences must be visited upon those whose conduct" they desire to modify. *Griffin*, 458 U .S. at 575. Moreover, the simple argument that common sense or intuition should negate against an interpretation that a statute authorizes the imposition of disportionate awards is without merit. For even if Congress did not precisely envision the potentially significant difference between the "highest rate of wages" and wages due under the oral contract it is enough that Congress intended the language it used to be applied directly. *See Griffin*, 458 U.S. at 576, citing, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-345 (1979); *TVA v. Hill*, 437 U.S. 153, 172 (1978). The

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limited interpretation the practical effect would be to render section 10601 meaningless. This is an absurd result.

remedy for any dissatisfaction with the impact of such statutory drafting lies with Congress, not with the courts. *Id.*

2. Genuine Issue of Material Fact

Summary judgment is appropriate when the moving party shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). It is upon this well-founded Rule 56(c) standard that TCW relies to defeat the crewmembers' motion for summary judgment. TCW contends that regardless of the interpretation of section 11107 there remain genuine issues of material fact that preclude the entry of summary judgment. This Court disagrees.

TCW argues that genuine and material facts relative to the individual wage assessment of each crewmember remain unresolved and therefore a trial on the amount of wages due must be held. Specifically, TCW sets out several questions of fact that must be resolved to determine the 11107 wages due. First, for the crew members to prevail on summary judgment they must establish, as a matter of law: (1) his port of his engagement and (2) the "highest rate of wages" paid to a seaman in that port at the time of his engagement. It is TCW's position that the crewmembers have failed to present sufficient undisputed evidence establishing these facts. Second, TCW contends that there remain factual disputes as to the relative tonnage calculations for Trips 28 and 29. And lastly, TCW argues that the crewmembers have failed

to met their burden of proof as to the amounts owed for Trips 24-27. Nevertheless, this Court finds that, with the exception of the disputes regarding Trips 24-27, these alleged questions of fact do not preclude a finding of summary judgment in this case.

(a) The Applicable Wage Rate Dispute

The crewmembers advance the following position on the applicable wage rate— each crewmember is entitled to $40.00/short ton of fish per trip. This determination is supported by undisputed evidence.[6/] that the "highest rate of wages" paid aboard the CHLOE Z during the period in question is the "highest rate of wages" in the different

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[6/] The Court does not accept the Crewmembers' argument that the $40.00 rate is applicable to all six of the disputed CHLOE Z trips. Section 11107 clearly states that the wage rate is to be determined by an evaluation of the "highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement." Accordingly, as the highest rate of wages aboard the CHLOE Z for each trip differs, is undisputed and easily determined the Court will not apply a blanket $40.00 rate to all Trips. The "highest rate of wages" for each of the Trips at issue shall be determined through the CHLOE Z Fishing Company Payroll Worksheets. See Meneghini Declaration, Exhibits (Trip 29 = $40.00; Trip 28 = $39.00; Trip 27 = $40.00; Trip 26 = 39.00; Trip 25 = 39.50; Trip 24 = 40.00).

ports of engagement. The undisputed evidence[7/] demonstrates that the CHLOE Z recruited and engaged seamen from throughout Micronesia and the Western Pacific. Therefore, as the CHLOE Z engaged seamen in these very same ports, the highest wage paid aboard the CHLOE Z is the highest wage paid at each of these ports. Despite, this conclusion, and the crewmembers' clear intention to be bound by this determination, TCW makes the nonsensical and factually unsupported argument that the applicable wage rate is still in dispute. However, this alleged dispute over the exact wage rate due does not preclude summary judgment on the determination of the "highest rate of wages" for three separate reasons: (a) TCW has failed to met its Rule 56(e) burden as to this issue; (b) this factual dispute is not material; and, (c) it is not genuine.

(1) Rule 56(e) Burden on the Nonmoving Party

TCW's argument regarding the applicable wage rate issue is straightforward. Based on the undisputed facts there still remains a question of material fact as to what the "highest rate of wages" was at each of the different ports of engagement. However, in making this

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7/ "The crewman aboard the F/V CHLOE Z were engaged and brought aboard the boat at various places, including Guam, American Samoa, the Solomon Islands, Tinian, and Papua New Guinea. The places of engagement are shown on the Passenger List/Crew List. Exhibit A." See TCW v. CHLOE Z, District Court of Guam, CV96-00055, Declaration of Thomas Meneghini, filed January 3, 1997 at paragraph 12 and Exhibit A to Declaration, ("Meneghini Declaration").

argument TCW has failed to set out specific facts supporting this position as required by Federal Rule of Civil Procedure 56. Under Rule 56, once the moving party has made a properly supported motion the burden shifts to the nonmovant to demonstrate the existence of a genuine dispute. Fed.R.Civ.P. 56(e). This demonstration requires a specific factual showing that a dispute exists.

As to the matter of the applicable wage rate, the crewmembers have supported, through the presentation of undisputed fact, their position that the "highest rate of wages" paid aboard the CHLOE Z is the "highest rate of wages paid" at any of the ports from which the CHLOE Z engaged seaman. Nevertheless, TCW has failed to present any specific facts demonstrating that there exists, or that TCW could prove, another "highest rate of wages" at trial.

TCW appears to rely on an allegation that the $40.00 rate, the highest rate of wages paid on board CHLOE Z during the period in question, could not be the highest rate of wages paid at the different ports of engagement. TCW, in its Memorandum in Opposition at pages 16-17, states:

> The statutory wage supplied by section 11107 is determined by looking to the 'highest rate of wages *at the port from which the seaman was engaged*.' This rate is not the $40 per ton paid to the fish captain, Vjekoslav Gobin.

In evaluating this argument the Court posed the following simple query: Why not? TCW fails to present any factual evidence that any "higher rate of wages" exists. TCW's bare declaration is, without specific factual support, not enough. Moreover, this argument, that the $40.00 rate is applicable only to the port of engagement of Gobin, ignores reason.

TCW's position fails to recognize that simple, inescapable logic requires—in the absence of conflicting facts or contradictory evidence—a determination that the highest wage rate paid aboard the actual vessel engaging a seaman is the "*the highest rate of wages at the port from which the seaman was engaged.*" That is, by engaging a seaman at a specific port a vessel places itself as an employer in the general labor market of that port. Consequently, the highest wage rate paid aboard that vessel is, arguably, the highest rate in that port. The simple, undisputed fact that the CHLOE Z engaged its crewmembers at several different ports establishes the highest wage in that port. And as TCW has failed to present specific facts demonstrating an alternative higher wage rate[8/] at Guam, Samoa or the High Seas exists, this Court finds that the Crewmembers' demonstration that the "highest rate of wages" paid by the CHLOE Z is the "highest rate of wages" paid at every port of engagement at issue. *See Anderson*, 477 U.S. at 249-50 (summary judgment is

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8/ On the contrary, TCW's supporting documentation endorses the finding that the highest rates paid throughout the Western Pacific tuna industry and the ports of engagement in this area were those paid aboard the CHLOE Z. See Meneghini Declaration at para. 23.

appropriate where the evidence presented by nonmovant is not significantly probative).

(2) Materiality

As the Supreme Court has explained, a fact dispute is material where it involves a disagreement "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Thus, under Anderson to preclude summary judgment the factual dispute raised by TCW, the nonmovant, must be material: it must be an issue required to be decided in order to resolve the substantive claim to which the Rule 56 motion is directed. This Court recognizes TCW's argument that there remains a factual dispute over the **absolute** "highest rate of wages" paid in Guam, Samoa or any of the several possible ports of engagement. Nevertheless, given the fact that the undisputed facts of this case have demonstrated that the crew is entitled to these wages and that the crew has established, through the presentation of undisputed documents, a "highest rate of wages" in each of the ports in question, any individual determination of the **absolute** "highest rate of wages" in each of the ports of engagement is not material. Furthermore, any further discovery, investigation or trial on this matter which may or may not demonstrate a higher wage will not "affect the outcome of the suit under the governing law." The crewmember 's claim is resolvable now without the necessity of determining the specific wage rate dispute raised by TCW.

(3) Genuine Dispute

A dispute about a material fact is genuine if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. In determining whether a dispute is genuine, an analysis of the practical logic of this case is quite revealing. At this stage in the proceeding there is sufficient, undisputed factual support to find that all elements have been established and that a level of damages can be determined. Therefore, there is a legal sufficiency, based on the uncontested facts presented, to decide this case. As well, assuming *arguendo*, that TCW's argument (that there exists an alternative "highest rate of wages" for each port of engagement) were found to be true, such a finding would not support a verdict in its favor. On the contrary, any such alternative finding would result in the determination of a higher wage rate than currently established. Such an outcome would undoubtedly be contrary to TCW's interests. Based on the undisputed facts additional discovery and investigation will not change the substantive outcome of this matter, it will merely delay the inevitable, and do so to the detriment of both parties.

(b) Disputes Regarding Tonnage Calculations

Next TCW argues that there remain genuine issues of material fact concerning the relevant tonnage calculations for Trips 28 and 29. As the crew of CHLOE Z was contracted on a lay share basis such disputes must be resolved to properly adjudicate the crews' section 11107 claims. Specifically TCW, through the declaration of Mr.

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Thomas Meneghini, has demonstrated that the tonnage amount the CHLOE Z Fishing Company used to calculate wages was a net or adjusted figure. CHLOE Z Fishing Company would adjust the gross tonnage of fish caught based on two variables: (1) fish size and (2) rejects. As this calculation method was not disputed by the crew members this method is accepted, for purposes of this motion, as true. Moreover, due to the per ton nature of crew wages this determination is therefore material to the any 11107 claim in this case. However, based on this Court's evaluation of the parties submissions and the case record as a whole it finds that the tonnage calculations for both Trip 28 and Trip 29 are undisputed.

(1) TRIP 29

The CHLOE Z's crew for Trip 29 was never paid. Meneghini Declaration at para. 20. However, TCW contends that the 1230 ton figure used by the crew-members is a mere estimation, presented for settlement purposes only, and no proof of the actual tonnage has been presented. Therefore, contends TCW until the crew-members can demonstrate what the actual adjusted tonnage was for Trip 29 that this issue remains in dispute.

This position ignores reality. The practical reality is that the fish from Trip 29 were never sold by CHLOE Z Fishing Company. The catch from Trip 29 was abandoned by the CHLOE Z Fishing Company after the vessel and fish were arrested in July 1996. The record in this case demonstrates that this fish catch was sold by the U.S. Marshal's Service under Order of this Court in August

1996. The terms of this sale were quite simple: 1200 tons of fish "as is, where is." Regardless of the CHLOE Z Fishing Company's prior practice, no adjustments for fish size or rejects were made as to the fish caught on Trip 29. Thus, to apply any adjustments to that catch is a fiction which this Court will not recognize. The undisputed evidence is that the fish catch from Trip 29 was sold as a single 1200 ton lot. Accordingly, the 1200 ton figure will apply to Trip 29.

(2) TRIP 28

TCW contends that the amount of the adjusted tonnage of Trip 28 is in dispute. This position is based on the crewmembers demands to be paid for 1655 short tons in conflict with the CHLOE Z Fishing Company document, presented by TCW, which demonstrates the adjusted tonnage at 1566 short tons. Therefore, TCW contends this dispute precludes summary judgment. This Court disagrees.

Despite the appearance of a dispute as to the applicable tonnage for Trip 28, an objective evaluation of all the undisputed facts in this case clearly demonstrates that the Trip 28 adjusted tonnage calculation has been established. The undisputed facts show: (1) the Trip 28 crew was never paid; (2) the crew was paid on a per ton basis; (3) the tonnage used to base crew pay was adjusted for cannery rejects and fish size; (4) the gross tonnage caught was 1677 short tons; (5) the reject weight was 22 short tons; and (6) the fish size reduction was 89 short tons. Banning Declaration at Exhibit A; Meneghini

Declaration at paragraphs 15, 24 and Exhibit B. Accordingly, this Court finds that the undisputed evidence demonstrates that the Trip 28 crew is entitled to payment for 1566 short tons. Summary judgment on this issue is proper as no trial is needed as there are no factual disputes that might affect the outcome of this determination.

(C) Disputes Regarding "Short Checks" for TRIPS 24-27

Lastly, the crewmembers' claim that each individual member of the CHLOE Z crews of Trips 24-27 are entitled to wages for 10% of the adjusted tonnage for each of Trips 24 through 27 inclusive. However, after reviewing the parties' opposing factual submissions on this issue the Court finds that the declaration and documents submitted by TCW raise a genuine question of material fact. Summary judgment on this issue is thereby precluded. *Matsushita Electrical*, 106 S. Ct. at 1356 (stating that courts must view the evidence in the light most favorable to the non-moving party; if direct evidence as to material facts conflicts, summary judgment must be denied). The determination of the amount of short checks each crewmember is owed for Trips 24-27 is a question of material fact better left for trial. However, as this motion was filed within the opening months of discovery if the crewmembers can, through additional discovery, develop undisputed facts to support its position this Court will entertain a second Rule 56 motion on the limited issue of wages due for Trips 24-27.

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D. OTHER ISSUES

The following section discusses various collateral issues raised by the parties in these motions.

1. Seaman Status

TCW also argues that, for purposes of calculating the "highest rate of wages" due a seaman under section 11107, the wage rate paid to the CHLOE Z's "fish captain" may not be considered. The basis of TCW's position is that the position of fish captain is equivalent to that of a ship's master and a master by definition may not be considered a seaman under section 11107. This statement is without support for several reasons.

The undisputed evidence demonstrates, despite TCW's argument, that the CHLOE Z's "fish captain" and the CHLOE Z's "master" are not equivalent. The undisputed facts show that the CHLOE Z's "fish captain" was not the licenced master sailing with the vessel. See Crewmember's Reply Memorandum dated January 10, 1997, p. 4 n .1. Furthermore, the CHLOE Z Fishing Company Payroll Sheets clearly enumerate separate individuals serving aboard the CHLOE Z in the position of "master" and the position of "fish captain.' See Meneghini Declaration, Exhibits. Therefore, TCW's "equivalency" argument is factually erroneous.

As well, assuming arguendo, that TCW's position that the "fish captain" of a purse seiner is more analogous to a vessel's master than a seaman, this Court finds that

such an analogy would not preclude the fish captain from the protections provided by § 11107. Section 11107 does not define seaman. This term is defined within the "Definitions" section of Part G to Title 46. Section 10101(3) clearly states "'seaman' means an individual (except scientific personnel, a sailing instructor, or a sailing school student) engaged or employed **in any** capacity on board a vessel." (emphasis added). There is no limitation excluding the application of a vessels master from the term seaman. Indeed, as a vessel's master "commands" the vessel he is, by definition, employed in a capacity on board. The fish captain is undoubtedly both a seaman as defined under section 10101 and, by virtue of the type of employment contract he was to be paid under, "lay share fisherman." Both of which are entitled to relief under section 11107. *See Bjornsson*, 863 P.2d at 237 (holding that section 11107 applies to lay share fisherman); 46 U.S.C. § 11107.

Also, TCW appears to argue that because 10101 provides a separate definition for "master" a "master" could not be included in the ranks of seamen. The mere fact that section 10101 also provides a definition for master does not legally, linguistically or factually preclude the inclusion of "master" in the ranks of a vessel's seamen. In making this determination, this Court recognizes, but for several reasons declines to follow, *Johnson v. Offshore Tankers Service, Inc.*, 789 F.2d 1417,1419-1420 (9th Cir. 1986) (finding that a "master" was not entitled under 46 U.S.C. § 596 (repealed) to bring an action as a "seaman" for penalty wages). First, *Johnson* is not directly on point as it interprets § 596 not 11107; as well, *Johnson* ad-

dressed the application of the statute to a vessel's actual master not a fish captain. Second, and more importantly, this Court feels that the rationale of Johnson is less applicable in the context of the commercial fishing industry to which section 11107 applies.

In *Johnson*, the Ninth Circuit reasoned that seamen as "'ward(s) of the admiralty,' are often ignorant and helpless, and so in need of protection against himself as well as others. The master, on the other hand, is able in most instances to drive a bargain for himself, and then when the bargain is made, to stand upon his rights. Discrimination may thus be rational in respect of remedies for wages." *Johnson*, 789 F.2d at 1419-1420. This rationale while well supported in the traditional maritime profession is less applicable in the context of the fishing industry to which section 11107 is aimed. The "fish captain" of a purse seiner is not directly analogous to the traditional "master" who is generally a "professional" mariner in the sense of having received a formal education. Rather, a "fish captain" is an accomplished seaman who attains the position through years of sea time and is more analogous to a senior seaman or fisherman than someone of a different class. In the context of the commercial fishing industry the terms "master" and "seaman" are not mutually exclusive and the "fish captain" is entitled to the same protections due a seaman under section 11107.

This reasoning is also supported by two Supreme Court cases cited to by the *Johnson* Court. In *Blackton v. Gordon*, 303 U.S. 91, 58 S. Ct. 417 (1938) it was recognized that "[w]hile, within the purview of some of the acts

concerning shipping, a master is included in the class designated seamen, in others the expression excludes the master." Further support is found in *Warner v. Goltra*, 293 U.S. 155, 55 S. Ct. 46 (1934), where the Court held that the terms "master" and "seaman" were not mutually exclusive when used in a statute providing a remedy for bodily injury. The *Warner* opinion reasoned that in circumstances where the "master and seaman are approximately equal" the master is included in the term seaman. *Id.* at 162. Such is the case under 46 U.S.C. §§ 10601 and 11107.

2. Punitive Damages

TCW contends that 46 U.S.C. § 11107 (under the interpretation advanced by crewmembers) is punitive; and therefore, it cannot be applied against a vessel *in rem*. In support of this argument TCW relies on *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 496 (9th Cir. 1991). *Hunley* prohibits the recovery of punitive damages *in rem*. *Id.* Although this Court agrees that in certain situations, such as the collision fact pattern involved in *Hunley*,[2/]

[2/] *Hunley* involved a collision at sea between two ships that had each failed to maintain a proper lookout. One of the ships, the EASTERN GRACE, did not stand by and render assistance as required under maritime law. The other colliding vessel subsequently sank. The district court in that case determined that the EASTERN GRACE was grossly negligent and awarded $25,000 in punitive damages to the claimant. However, the Ninth Circuit reversed the punitive damage award because it had been improperly assessed against the EASTERN GRACE in

punitive damages will not be recoverable against a vessel. However, *Hunley* and its rationale are inapplicable in this case.

The *Hunley* Court premised its decision on a finding that a maritime action in rem will only be available in connection with a maritime lien, and claims that do not create a maritime lien must be pursued in personam. *Hunley*, 927 F.2d at 496. *Hunley*, stands for the proposition that a claim for punitive damages does not give rise to a maritime lien; accordingly, no action in rem may be sustained. *Id.* When viewed in this light it is clear that *Hunley* is inapplicable to claims asserting statutory wage penalties—as such claims give rise to maritime liens.[10/] Accordingly, this Court finds that TCW's reliance on *Hunley* is without merit.

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rem. Hunley, 927 F.2d at 496.

[10/] In evaluating seamen claims for statutory wage penalties under similar statutes such penalties have been characterized as "wages of the crew" for purposes of allowing seamen to assert preferred maritime liens. *West Winds Inc. v. M/V RESOLUTE*, 720 F.2d 1097, 1103 n. 4 (9th Cir. 1983), *citing, Collie v. Fergusson*, 281 U.S. 52, 54, 50 S. Ct. 189 (1930); *Gerber v. Spencer*, 278 F. 886, 889 (9th Cir. 1922); *see generally Seattle-First National Bank v. Conaway*, 98 F.3d 1195 (9th Cir. 1996) (recognizing that a fisherman's wage claim brought under § 10601 and § 11107 is cognizable in rem); 46 U.S.C. § 10602 ("When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen").

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3. Attorneys Fees

The crewmembers also move for an award of attorneys' fees. TCW opposes any award of fees based on the application of the American Rule. The "American Rule," which precludes the award of attorneys' fees to a prevailing party in a civil case, is equally applicable in admiralty cases. *Galveston County Navigation District v. Hopson Towing Co., Inc.*, 93 F.3d 353, 356 (5th Cir. 1996), *citing, Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) (holding, pursuant to the "American Rule," that "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); *Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1011 (5th Cir. 1984) ("The general rule in admiralty is that attorneys' fees are not recoverable by the prevailing party"). Thereby precluding an award of attorney's fees in this instance. Nevertheless, TCW's position failed to address the case law establishing a clear exception to this rule.

TCW is correct, generally, the prevailing party in a maritime action is not entitled to attorneys' fees. However, as stated above, TCW's position fails to consider the "bad faith" exception set out by the Supreme Court in *Alyeska*. A court may under certain circumstances assess an award of attorney fees. *Alyeska*, 421 U.S. at 258-59 ("[A] court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .'"), *quoting, F.D. Rich Co., Inc. v. United States for Use of Industrial*

Lumber Co., Inc., 417 U.S. 116, 129 (1974), citing, *Vaughan v. Atkinson*, 369 U.S. 527 (1962). Specifically, a court may, under its equitable powers, decide to award fees where the defendant has forced the plaintiff to "go to court to get what was plainly owed him." *Vaughan*, 369 U.S. at 531. This rule has been applied in the maritime context to penalty wage claims. *Hyeon Su v. M/V Southern Aster*, 978 F.2d 462, 475 (9th Cir. 1992).

However, despite this recognition that the "bad faith exception" applies in penalty wage cases, TCW's legal actions in this matter have not risen to the level of "callous . . . willful and persistent" behavior which "forced plaintiff to hire a lawyer and go to court to get what was plainly owed him." *Vaughan*, 369 U.S. at 531. TCW has presented a reasonable argument that section 11107 may be interpreted such that the crewmembers would be are owed a lesser amount than demanded. Moreover, as acknowledged by crewmembers' counsel there is no published opinion interpreting 11107's "highest rate of wages" language; therefore, it was not objectively clear to the parties to this action that the level of wages demanded by the crew in this case were "plainly owed." *Id.* Accordingly, this Court declines to find that TCW's offer of lower wages in this case was made in bad faith or forced the crewmembers to go to court to get what was "plainly owed." No attorneys' fees shall be awarded.

4. Prejudgment Interest

Lastly, the crewmembers request an award of prejudgment interest. An admiralty court has discretion to

grant or deny prejudgment interest. As reaffirmed in *Saratoga Fishing Co. V. Marco Seattle Inc.*, 69 F.3d 1432 (9th Cir. 1995), the general rule in admiralty or maritime cases is to grant prejudgment interest, unless peculiar circumstances justify denial. TCW has failed to present, nor can this Court discern, any "particular circumstances" why this general rule should not apply in this case. And although TCW has presented an objectively reasonable claim regarding an alternative interpretation of section 11107, such a dispute, even made in good faith, is not grounds for denial of admiralty prejudgment interest. *See generally City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189, 115 S. Ct. 2091 1995 A.M.C. 1882 (1995) (holding that the awarding of prejudgment interest in admiralty is a basic principle and not a penalty). Accordingly, this Court grants the crewmembers request for prejudgment interest. *See generally George v. Kramo Ltd.*, 796 F. Supp. 1541 (E.D.La. 1992) (holding that seaman was entitled to prejudgment interest under penalty wage statute—46 U.S.C. § 10113); *Smith v. Western Offshore, Inc.*; 590 F. Supp. 670 (D.C.La. 1984) (seaman was entitled to prejudgment interest as to both compensatory and punitive elements of relief under a penalty wage statute).

Neither of the parties have submitted argument on the issues of either the prejudgment interest rate or its date of accrual. Nevertheless, this Court finds that: (1) the rate of prejudgment interest shall be calculated in accordance with the rate prescribed under 28 U.S.C. § 1961 and (2) such interest accrual date shall be the date of the crewmembers intervention into the above-captioned case. *See*

Nicole Tranhan Limitation Proceeding, 10 F.3d 1190 (5th Cir. 1994); *see generally* Schoenbaum, ADMIRALTY AND MARITIME LAW § 5-21 at 234 (2nd ed. 1994).

For the reasons stated the crewmember 's Summary Judgment Motion is GRANTED with the exception of its 10% claim to wages for Trips 24-27.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that TCW's Cross-Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Crewmembers' counsel shall, as to their causes of action, prepare and submit the appropriate judgment, stipulated as to form by all parties, in accordance with the findings and conclusions herein. *See generally* Fed.R.Civ.P. 54; L.R. 260-4.

Dated: March__. 1997.

APPENDIX C — NINTH CIRCUIT COURT OF APPEALS ORDER AND OPINION WITH RESPECT TO REQUEST FOR JUDICIAL NOTICE FILED JANUARY 26, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TCW SPECIAL CREDITS, *Plaintiff-Appellant*	)	
v.	)	No. 97-15726
CHLOE Z FISHING COMPANY, INC., *Defendant,*	)	D.C. No. CV 96-00055
v.	)	
JUAN BARANDIARAN, ALFRED CANEPA, VJEKOSLAV GOBIN, JERKO KURTIN, MILARAD BEADER, DANI BLASLOV, BORIS GOBIN, IVICA GOBIN, STIVEN GOBIN, DAMIR KONCURAT, ZORAN KURTIN, OLIVER SVORCINA, NEJDELKO VITLOV, ERNES GOBIN, DRAGAN BLASLOV, DRAGAN LONGIN, AND NIKSA ZLENCIC, *Plaintiffs-Intervenors-Appellees.*	)	

ORDER

Before: REINHARDT, LEAVY, and THOMAS, Circuit Judges.

Appellees' request for judicial notice in support of petition for rehearing and suggestion for rehearing en banc is DENIED.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thomas have votes to reject the suggestion for rehearing en banc, and Judge Leavy has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appendix D

APPENDIX D — NINTH CIRCUIT COURT OF APPEALS ORDER RE REQUEST FOR JUDICIAL NOTICE FILED DECEMBER 1, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TCW SPECIAL CREDITS, *Plaintiff-Appellant*	)	
v.	)	No. 97-15726
CHLOE Z FISHING COMPANY, INC., *Defendant,*	)	D.C. No. CV 96-00055
v.	)	
JUAN BARANDIARAN, ALFRED CANEPA, VJEKOSLAV GOBIN, JERKO KURTIN, MILARAD BEADER, DANI BLASLOV, BORIS GOBIN, IVICA GOBIN, STIVEN GOBIN, DAMIR KONCURAT, ZORAN KURTIN, OLIVER SVORCINA, NEJDELKO VITLOV, ERNES GOBIN, DRAGAN BLASLOV, DRAGAN LONGIN, AND NIKSA ZLENCIC, *Plaintiffs-in-Intervention.*	)	

ORDER

Before: REINHARDT, LEAVY, and THOMAS, Circuit Judges.

Appellees Juan Barandiaran, et al., filed a Request for Judicial Notice on June 18, 1997, and a second Request for Judicial Notice on July 11, 1997. Appellant TCW Special Credits filed a Request for Judicial Notice on October 7, 1997, and a Supplemental Request for Judicial Notice on November 18, 1997.

The four Requests are hereby

DENIED.

Appendix E

APPENDIX E — UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JULY 1, 1997

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,*	)	
v.	)	Case No. 96-1663-BTM(JFS)
THE VESSEL F/V LARRY Z, (OFFICIAL NUMBER 555372), ITS ENGINES, APPAREL, ELECTRONICS, TACKLE, BOATS, APPURTENANCES, ETC., IN REM, AND LARRY Z FISHING COMPANY, IN PERSONAM, *Defendants,*	)	
AND ALL RELATED CLAIMS	)	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Appendix E

INTRODUCTION

This matter comes before the Court on a motion for partial summary judgment by the United States. The Court finds the motion suitable for decision without oral argument pursuant to Local Rule 7.1(d)(1). For the reasons stated below, the Court DENIES the motion.

DISCUSSION

In this and three related cases, the United States has filed an action to foreclose its preferred maritime mortgage against a fishing vessel and its owner. The present motion concerns a purely legal issue surrounding the vessel owner's alleged failure to pay various fishermen and the other crew members (collectively, the "Crew"), who are Plaintiffs-in-Intervention in the action. The Crew allege that the owners employed them under oral agreements in violation of 46 U.S.C. § 10601[1/] and then failed to compensate them adequately. The parties agree that § 10601 applies to the Crew and that a related maritime statute, 46

1/ The statute provides in relevant part:

> (a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel, fish processing vessel, or fish tender vessel shall make an [sic] fishing agreement in writing with each seaman employed on board . . . .
>
> (b) The agreement shall be signed also by the owner of the vessel . . . .

46 U.S.C. § 10601.

U.S.C. § 11107, provides for the appropriate remedy. *See Seattle-First National Bank v. Conway*, [sic] 98 F.3d 1195, 197 (9th Cir. 1996). At issue here is the proper interpretation of § 11107.

That section states:

> An engagement of a seaman contrary to a laws of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

46 U.S.C. § 11107. The United States now seeks partial summary judgment on the statutory construction of the "highest rate of wages" language. According to the United States, the remedial clause entitles aggrieved seamen to the highest rate of wages for seamen of comparable employment, e.g., engineer get the highest wages of engineers from the same port, oilers get the maximum oiler wage, etc. The Crew, on the other hand, read the relevant language to provide aggrieved seamen with the highest wages of *any* seaman from that port, regardless of his job description or duties.

As initial matter, the Court notes that while no reported case provides a firm interpretation of § 11107, a district judge in Guam recently adopted the Crew's position on this issue. *TCW Special Credits v. F/V*

CHLOE Z, No. 96-00055 (Mar. 6, 1997 D. Guam). For the reasons ably set forth in that opinion and supplemented below, the Court agrees with the *CHLOE Z* decision, which is now on appeal before the Ninth Circuit.

The first step in any statutory interpretation is an examination of the plain meaning of the statute at issue. *See Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268 (9th Cir. 1990) ("It is elementary that the starting point in every case involving construction of a statute is the language of the statute itself." (internal quotations omitted)). Although the Crew argue, and the *CHLOE Z* court held, that the plain meaning of the "highest rate of wages" language "settles the issue," *CHLOE Z* slip op. at 8, the Court recognizes some ambiguity on this issue. While it is true that the United States' interpretation of the statute requires the adoption of a judicially imposed modifying clause (limiting the remedy to "similarly situated seamen"), so too, the Crew's approach asks the Court to assume that the "highest rate of wages" means the "highest rate of wages *of a seaman*."

Nonetheless, in the context of the statute and its history, the Crew's interpretation demands only a slight inferential leap. First and most obviously, one can presume that reference to "wages" in the admiralty statute involves the wages of seamen. Second, § 11107 must be read in light of the history of that provision. The current statute, enacted in 1983, recodifies 46 U.S.C. § 578, the

continuation of Rev. Stat. 4523 (1874).[2/] The 1874 statute derived from an 1840 law providing:

> All shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void; and any seamen so shipped may leave the service at any time, and demand the highest rate of wages paid to *any seaman* shipped for the voyage, or the sum agreed to be given him at his shipment.

Act of July 20, 1840, c. 48, § 10, 5 Stat. 395 (emphasis added). It seems clear that, at the very least, the "wages" referred to in § 11107 must be limited to the wages of seamen.

On the other hand, nothing in the statutory scheme indicates that the remedies in § 11107 should be further limited to the wages of comparable or similarly situated seamen. Nor has the United States pointed to any legisla-

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[2/] The current statute contains only minor changes from 46 U.S.C. § 578, which read:

> All shipments of seamen made contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

Id.

tive history to that effect. Viewing the admiralty statutes as a whole, the Court finds this Congressional silence quite telling. In several instances, Congress has expressly narrowed the scope of admiralty remedies For instance, 46 U.S.C. § 7113 entitles those performing certain duties for the United States Government in time of war "to the highest rate of wages paid in the merchant marine of the United States *for similar services*." *Id.* (emphasis added). In addition, 46 U.S.C. § 10508 (applicable to coastwise voyages) provides wrongfully employed seamen with the opportunity to recover "the highest wage that was paid *for a similar voyage within the 3 months before the time of engagement* at the port or place at which the seaman was engaged." *Id.* (emphasis added). Section 11107 contains no such limitations, and the Court declines to add them absent Congressional authorization.

The United States advances two principal arguments in support of its overall position. First, the Government contends that the Crew's interpretation and the *CHLOE Z* decision fly in the face of an unbroken chain of decisions awarding aggrieved seamen the highest wage of seamen with comparable duties and responsibilities. Since the case law consistently and clearly supports their reading of the statute, the United States argues, Congress necessarily assumed this interpretation would attach to § 11107. The Court disagrees.

Appendix E

None of the cases cited by the government concerning the predecessors to § 11107 and the related statutes[3/] offers any meaningful discussion of the of the [sic] "highest rate of wages" language, and few of them even award the wages of comparably situated seamen. For example, in *Lent Traffic Co. v. Gould*, 2 F.2d 554 (3rd Cir. 1924), the Third Circuit held that an unlawfully shipped seaman was entitled to "his pay at the rate agreed upon" pursuant to Rev. St. 4523. *Id.* at 557. The case does not explore the prevailing "highest rate of wages" either for all seamen generally or for comparably employed seamen. Similarly, in *THE JAMES H. SHRIGLEY*, 50 F. 287 (N.D.N.Y. 1892), the court awarded a plaintiff her *promised* wage, not the highest wage of a similarly situated seaman. *Id.* at 288. Likewise, the court in *THE PACIFIC*, 23 F. 154 (W.D. Pa. 1885), after citing to Rev. St. 4523, awarded a deck hand the $35 per month paid to deck hands *on the same voyage* and did not look to the highest

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3/ Section 10508, also passed in 1983, is the successor statute to 46 U.S.C. §§ 574, 575 and Rev. Sts. 4520 and 4521. Applicable to coastwise voyages, § 10508 provides in relevant part:

> A master who carries a seaman on a voyage without first making the agreement required by section 10502 of this title [requiring, *inter alia*, written agreements] shall pay to the seaman the highest wage that was paid for a similar voyage within the 3 months before the time of engagement at the port or place at which the seaman was engaged . . . .

46 U.S.C. § 10508(a).

rate of wages *of the port from which the seaman was shipped. Id.* at 154. *THE ETNA*, 8 F. Cas. 803 (D. Me. 1838), is also inapposite, as it discussed the general abilities of the child plaintiff and does not delve into the specific duties of the seaman. Only in *THE AUSTRALIA*, 2 F. Cas. 235 (D. Me. 1859), did the court—without any significant analysis of the applicable statute—award the plaintiff cook "the highest price paid for a cook" at the seaman's port of departure. *Id.* at 238. Thus, even under the cases cited by the Government, the narrower interpretation of § 11107 and its predecessors is far from settled.

The United States' tenuous position is further weakened by a string of admiralty cases reflecting a contrary reading of the "highest rate of wages" language. In *Jameson v. THE REGULUS*, 13 F. Cas. 336 (D. Pa. 1800), the earliest known case interpreting this concept, the district court explained:

> If a seaman ships, and performs his contract, though verbal, he must be paid, at the highest rate of wages, given at the port of shipment within three months next precedent. . .. It must have been perceived by the framers of our law, that the general maritime law applied to this case; and that nothing was deficient, but the mode of estimating services. *It was fixed at the highest rate, that masters might be more on their guard, and see that the articles were executed, and thereby avoid the payment of the highest wages to ordinary seamen.*

Id. 15 336 (emphasis added). Similarly, in *Koukorinis v. S/T EURYPYLE*, 214 F. Supp. 344 (E.D. Va. 1963), the court looked to the "highest rate of wages prevailing *for able seamen* on American-flagged vessels" from the plaintiff's ports of engagement. *Id.* at 345 (emphasis added). The category of "able seamen" discussed in *Koukorinis* is considerably broader that the "seamen of comparable duties" reading offered by the United States. Numerous other cases also support the Crew's position that admiralty case law historically has not limited the remedial statutes to similarly situated seamen. *See, e.g., THE IANTHE*, 12 F. Cas. 1145, 1145 (D. Me. 1856) (nothing that "a seaman shipped without a contract in writing or print may quit the ship when he pleases . . . and may demand the highest rate of wages paid within three months of his shipment, at the port where he shipped, or the highest wages paid to *any* of the crew" (emphasis added)); *Graham v. THE EXPORTER*, 10 F. Cas. 920, 921 (S.D. Ohio 1875) (holding that an unlawfully shipped seaman could recover "the highest rate of wages paid *any seamen* on the voyage"). *Cf. THE KAROO*, 49 F. 651, 655 (W.D. Wash. 1892) (although remedial statutes inapplicable because case involved foreign vessel, awarding illegally shipped seamen estimate of "highest rate of wages obtaining at the port . . . where these men were secured").

The Government further argues that the Crew's interpretation of the statute is illogical, warning that the broader statutory approach would impose an undue and unintended penalty on shipowners, which, if applied to the ships at issue here, "could be six or seven times that of the fisherman's agree[d] upon wage." (United States P. & A.,

at 17.) The Court, however, finds there to be logical support for the Crew's position. As a general matter, the Court notes the basic principle of maritime law that seamen are "wards of the court." *Fuller v. Golden Age Fisheries*, 14 F.3d 1405, 1408 (9th Cir. 1994). While this will not justify added protection in all circumstances, *see, e.g., id.* (holding that seamen's wage claims were time barred), the Ninth Circuit has recently declared that "§ 11107 provides for a *penalty* against vessel owners who employ seamen without written agreements in violation of § 10601." *Seattle-First National Bank v. Conway* [sic], 98 F.3d 1195, 197 (9th Cr. 1996) (emphasis added); *see also Triventure Investment, Inc. v. M/V MIDAS*, No. C95-222WD, 1995 WL 848520, at *2 (W.D. Wash. 1995) ("A major sanction is provided by 46 U.S.C. § 11107.").

In *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), the Supreme Court construed another remedial admiralty statute, 46 U.S.C. § 596, which requires vessel owners who fail to pay seamen to "pay to the seaman a sum equal to two days pay for each and every day during which payment is delayed . . . ." The Court held that the district court had abused its discretion in limiting the damages calculation to the plaintiff's period of unemployment, *id.* at 569, explaining that the statute should be construed as written. The Supreme Court rejected the owner's contention that Congress could not have intended a seaman to receive over $300,000 in claimed penalties for what began as a dispute over $412.50 in withheld wages:

> It is in the nature of punitive remedies to authorize awards that may be out of propor-

> tion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter. It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute . . . . It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.

Id. at 576.

Given that the Supreme Court has permitted seaman [sic] to recover over 700 times their withheld wages under a separate statute, a sevenfold penalty under § 11107 would certainly be within the bounds of reasonableness. In addition, anything less might provide an insufficient deterrent to fishing companies and might betray the law's preference toward "[a] seaman's right to a written contract of hire." *Seattle-First National Bank*, 98 F.3d at 1196; *see TCW Special Credits v. F/V CHLOE Z*, No. 96-00055, slip op. at 12-12 (Mar. 6, 1997 D. Guam) (discussing how under the "compensatory" construction of § 11107, vessel owners' risk of exposure "would, due to the competitive nature of labor markets" and "the inequality in bargaining

position between fishing companies and unsophisticated fishermen/seamen," be "inconsequential").

Furthermore, the Crew's interpretation makes sense as a matter of policy. First, in the course of the challenging and hazardous conditions of maritime passage, seamen are often called upon to perform tasks in addition to their assigned responsibilities. In a storm, for example, the call for "all hands on deck" does not mean that each seaman is limited to his or her designated duties. Each seaman must pitch-in for the safe passage and good of the entire crew. In a storm, even the cook may be called on to bail or man the pumps and lines. Second, without a written agreement, disputes can arise as to what the seaman's duties actually were, so it would be difficult to determine the highest wage of a "similarly situated" seaman. Third, the shipowner is free to protect himself by a written agreement. Without such a contract, the crew members would be a "take it or leave it" situation during the lengthy litigation. Congress required a written agreement to avoid such disputes and to protect the uneven position of seamen. The Government's proposed construction unduly favors shipowners at the expense and delay of seamen—the persons Congress sought to protect. The statute was designed to encourage a written contract by putting the seaman in the most advantageous position absent such an agreement. With its punitive remedy, the statute thus prevents owners from waiting until the end of a voyage to offer an orally bound seaman a "take it or leave it" wage.

The qualifying language the Government seeks to apply to the statute appears nowhere in the text, and

"Congress could easily have [added it], had it wanted to." *Seattle-First National Bank*, 98 F.3d at 1198. Absent clear case law, legislative history, or statutory authority, the Court will not limit the remedies set forth in § 1107 to the highest rate of wages at the port of hire for seamen of comparable duties.

CONCLUSION

For the foregoing reasons, the Court DENIES the United States' motion for partial summary judgment.

IT IS SO ORDERED.

DATED: July 1, 1997

s/ Barry Ted Moskowitz
HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies to:

Counsel of Record
Magistrate Judge Stiven

APPENDIX F – EXCERPT OF HOUSE REPORT NO. 98-338.

HOUSE REPORT NO. 98-338

[Page 120]

The Committee also feels, as the courts have held, that the literal language of the statute should control the disposition of the cases. There is no mandate in logic or in case law for reliance on legislative history to reach a result contrary to the plain meaning of the statute, particularly where that plain meaning is in no way unreasonable.

Supreme Court, U.S.
FILED
MAY 27 1998
CLERK

No. 97-1745

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JUAN BARANDIARAN, *et al.*,
Petitioners,

v.

FISHING VESSEL CHLOE Z, OFFICIAL NO. 653391, HER ENGINES, NETS, FURNITURE, etc., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT TCW SPECIAL CREDITS IN OPPOSITION

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May 27, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a seaman who was not provided by his employer with a written agreement as required by 46 U.S.C. § 10601 is entitled under 46 U.S.C. § 11107 to recover captain's wages as a penalty *in rem* enforceable against the vessel, reducing the proceeds available to pay the vessel's unpaid secured lender.

LIST OF PARTIES AND RULE 29.6 LIST

The parties to this case are Plaintiff and Respondent TCW Special Credits; Plaintiffs-in-Intervention and Petitioners Juan Barandiaran, et al.; and Defendants Fishing Vessel CHLOE Z, Official No. 653391, Her Engines, Nets, Furniture, etc., *In Rem*, and Chloe Z Fishing Co., Inc., *In Personam*.

Respondent TCW Special Credits has no parent companies, non-wholly-owned subsidiaries, or affiliates that have issued shares to the public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1745

JUAN BARANDIARAN, *et al.*,
Petitioners,

v.

FISHING VESSEL CHLOE Z, OFFICIAL NO. 653391, HER ENGINES, NETS, FURNITURE, etc., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT TCW SPECIAL CREDITS IN OPPOSITION

Respondent TCW Special Credits ("TCW") hereby opposes the petition for writ of certiorari filed by Petitioners Juan Barandiaran, et al.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this matter are 46 U.S.C. §§ 10601 and 11107.

STATEMENT OF THE CASE

TCW, as agent and on behalf of certain funds and accounts, filed a complaint on July 5, 1996 seeking to foreclose on a preferred ship mortgage against the fishing

vessel F/V CHLOE Z ("CHLOE Z"). Certain crew members of the CHLOE Z subsequently filed a complaint in intervention, seeking penalty wages *in rem* against the vessel under 46 U.S.C. § 11107 for their employer's failure to provide them with written employment agreements pursuant to 46 U.S.C. § 10601. They argued below that, under the "plain" meaning of Section 11107, the amount of the penalty to which each member of the crew was entitled was the captain's wages.

In a case of first impression, the court of appeals rejected the crew's proposed statutory construction because it rendered superfluous significant portions of the statutory language. Interpreting the ambiguous statutory language in accordance with accepted rules of statutory construction, consistent with over 150 years of judicial decisions construing similar statutes, the court of appeals held that Section 11107 "entitles the wronged seaman to recover either his promised wages or the highest rate of wages of a seaman of comparable rating at the port from which he was engaged, whichever is higher." No other circuit court has yet considered the question of statutory construction presented here, and Petitioners present no sound reason why this Court should consider the issue at this time rather than allowing the courts of appeals to develop consensus or conflict on the question.

1. The CHLOE Z is a U.S.-flagged tuna boat that fished in the western Pacific. ER Tab 4 at 33.[1] The boat was owned and operated by the Chloe Z Fishing Company ("Chloe Z Co.") and was covered by a preferred ship mortgage held by TCW as agent of certain funds and accounts. ER Tab 1 at 4-5, Tab 7 at 102. TCW never owned or operated the CHLOE Z.

By late 1995, the Chloe Z Co. was in extreme financial distress and unable to pay the crew members for the

[1] "ER" refers to the Appellant's Excerpts of Record on appeal to the Ninth Circuit.

CHLOE Z's final two voyages (Trips 28 and 29). ER Tab 7 at 106-07. The Chloe Z Co. also failed to pay its mortgage holder, TCW. After the boat docked following Trip 29, the crew refused to off-load the fish they had caught, instead remaining on the boat for several months while they waited for payment from their employer. ER Tab 4 at 73.

2. On July 5, 1996, TCW brought this action against the Chloe Z Co. *in personam* and the CHLOE Z *in rem* to foreclose on its preferred ship mortgage. ER Tab 1 at 1. The vessel was immediately arrested and impounded by the U.S. Marshal. ER Tab 15 at 259. In December 1996, the vessel was sold at a U.S. Marshal's auction for $6,710,000 and the proceeds of the sale were deposited in the registry of the Court. These proceeds are not sufficient to pay TCW's secured claim in full after satisfaction of tort and crew wage claims that enjoy higher priority.

3. Twenty of the 22 former crew members from CHLOE Z Trips 28 and 29, plus one crew member from a prior voyage, filed complaints in intervention seeking recovery of unpaid wages. ER Tab 2 at 15-23. The intervening crew members asserted claims *in personam* against the Chloe Z Co. and, by virtue of the automatic maritime lien that exists for seamen's wage claims, also asserted claims *in rem* against the CHLOE Z. They alleged (correctly) that they had not received individual written contracts from their employer, as required by 46 U.S.C. § 10601, ER Tab 2 at 21; that each crew member had been orally promised a share of the CHLOE Z's catch, which varied substantially, depending on the crew member's position, ER Tab 7 at 108; and that they had not been paid for Trips 28 and 29.

Based on these allegations, the crew members asserted a maritime lien against the CHLOE Z *in rem* for statutory wages under 46 U.S.C. § 11107, which provides that a "seaman"

> engaged contrary to a law of the United States . . . is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

46 U.S.C. § 11107; ER Tab 2 at 21. In practical terms, the crew members asserted a wage lien enforceable against the vessel to which TCW's preferred mortgage is subordinate. ER Tab 5 at 80.

Eight of the intervening crew members later executed agreements settling and assigning their claims to TCW, which paid the settlement amounts in cash. ER Tab 12 at 180-81. Nonetheless, plaintiffs' counsel continues to assert claims on behalf of at least six of the settling crew members. ER Tab 2 at 15-23. In addition, several junior lienholders on the CHLOE Z filed separate *in rem* complaints in intervention against the vessel. ER Tabs 18-21.

4. The crew members continue to assert falsely, as they did below, that TCW "covertly" encouraged them to fire their counsel and to accept "lowball" settlements. Pet. at 26. TCW did not offer "lowball" settlements, but rather made written settlement offers in the full amount of unpaid agreed wages for every crew member of the CHLOE Z, plus repatriation costs and miscellaneous expenses. ER Tab 12 at 175-76 ¶¶ 12-14, ER Tab 14 at 221, 251. Eight crew members accepted the offers and have received full settlement payments. Appellant's Supplemental Excerpts of Record ("ASER") Tab 30 at 450, Tab 32 at 479.

Nor did TCW encourage the crew members to fire their counsel. The crew members, many of whom are from Croatia, initiated direct settlement talks with TCW's principals (not its counsel) only after the crew members learned that the crew members' counsel had failed to communicate TCW's repeated, written settlement offers to them. ER Tab 11; ASER Tab 23 at 395, Tab 26 at 411-12; Appellees' Supplemental Excerpts of Record

("SER") Tab 12 at 92. Many of the crew members, incensed at their counsel's conduct, sought assistance from independent Croatian counsel in negotiating and consummating the settlements. ER Tab 10 at 159-63, Tab 11 at 165.

Based upon the crew members' one-sided and incomplete description of these events, the district court entered an order directing trial counsel to show cause why they should not be disciplined for their alleged misconduct relating to settlements. SER Tab 11 at 86. Based on TCW's extensive evidentiary submissions, ASER Tab 27 at 419, the district court concluded that the conduct of TCW's counsel conformed to the relevant ethical standards and dismissed the show cause order without imposing any sanctions. ASER Tab 28 at 440.

5. Before discovery was completed, the crew members moved for summary judgment against the vessel. ER Tab 3 at 25. They did not present evidence as to the "highest rate of wages" in each individual crew member's port of engagement. Instead, they said they would accept as penalty wages for each crew member—regardless of position, duties or agreed rate—the rate that had been orally promised to the CHLOE Z's Captain: $39 per ton of tuna caught for Trip 28 and $40 per ton for Trip 29. ER Tab 5 at 84.

TCW opposed the crew members' motion, ER Tab 5 at 84, explaining that the crew members were not entitled under Section 11107 to the Captain's rate of wages, which exceeded their own promised wages by a multiple of as much as eight. Rather, as established by a proper textual interpretation of Section 11107 and almost 200 years of relevant statutory interpretation, a crew member's permissible recovery against the vessel is limited to the higher of (1) the highest rate of wages paid to a seaman with similar rank and duties or (2) what he personally was promised. ER Tab 13 at 195.

The district court granted the crew members' motion, accepting the crew members' position that each was en-

titled to wages at the Captain's rate under the "plain meaning" of the phrase "highest rate of wages at the port" in Section 11107. ER Tab 15 at 263. Employing the Captain's promised share of $39 per ton for Trip 28 and $40 per ton for Trip 29, the district court authorized a total award of approximately $1,854,258, which amounted to an award of $61,074 to each crew member for Trip 28 and $48,000 for Trip 29. ER Tab 15 at 271, 276-77.

6. The court of appeals reversed, holding that Section 11107 does not entitle a crew member to recover the Captain's rate of wages against the vessel as a penalty for his employer's failure to provide a written agreement. *TCW Special Credits v. Chloe Z Fishing Co.*, Pet. App. A. The court of appeals began by noting "at least three problems" with the crew members' proposed construction of Section 11107: first, the phrase "highest rate of wages at the port," contrary to the crew members' contention and the district court's conclusion, is facially ambiguous in that it "fails to identify *whose* 'highest rate of wages' is to be used as the benchmark" for calculating the amount of recovery; second, the crew members' proposed interpretation would render superfluous the phrase "rate of wages" in Section 11107; and third, the crew members' proposed interpretation would likewise render superfluous the phrase "whichever is higher" because the "highest rate of wages" paid to any seaman regardless of job description by definition would always be as high as or higher than "the amount agreed to be given the seaman at the time of engagement." *Id.* at 10a-11a.

Applying the well-settled rule that a statute should be construed in a way that gives every word some operative effect, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), the court of appeals held that:

> the only logical and internally consistent reading of the statute is the one urged by both TCW and the United States: a wronged seaman is entitled to recover the higher of either the wages he orally agreed

> to, or the highest rate of wages that could be earned by a seaman at the port of hire *who has the same rating* as the complainant.

Pet. App. A at 11a.

The court of appeals found additional support for its holding in cases construing similar language in predecessor statutes. As the court of appeals correctly observed, those cases "consistently held that a seaman's 'highest rate of wages' was to be measured against seamen with the same rating or similar duties." *Id.* at 12a-13a (citing cases).

Based upon this holding and rationale, the court of appeals remanded the case "for a determination of the amounts due the various complainants." *Id.*

7. The case proceeded to trial on March 18-20, 1998. While acknowledging the court of appeals' holding that Section 11107 does not entitle them to the "highest rate of wages" paid to any seaman, the crew members argued at trial that they nevertheless are entitled to the highest rate of wages paid to any "undocumented seaman," a "rating" nowhere to be found in the applicable statutes or Coast Guard regulations. Because at least one "undocumented seaman" had previously served as a fish captain, the crew members argued that all "undocumented seamen," who comprised the vast majority of the CHLOE Z crew for Trips 28 and 29, are entitled, at a minimum, to the captain's wage of $40 per ton, plus unspecified additional compensation for the time they spent in port.

Although post-trial briefing has been completed, the district court has not yet made a ruling as to the amounts that the crew members are entitled to recover. If the district court agrees with the arguments advanced by the crew members, however, those amounts could be as high as or higher than the summary judgment award that was overturned by the court of appeals.

REASONS FOR DENYING THE PETITION

Petitioners contend that review by this Court is appropriate because the court of appeals' construction of Section 11107 is so unreasonable as to constitute a "revision" of the statute's language. Petitioners are wrong. The court of appeals simply interpreted ambiguous language in that statute in accordance with accepted rules of statutory construction and with over 150 years of judicial decisions construing similar statutes. Moreover, this case, in any event, is inherently unsuitable as a vehicle for resolving the proper construction of Section 11107 because the issue has yet to be addressed by any other lower court and because resolution of the issue here will not even be dispositive of the parties' rights. Review of the issue, if ever appropriate, should await the development of a conflict among the circuit courts and a case in which resolution of the question will make a decided difference in the final resolution of the parties' dispute.

I. THE COURT OF APPEALS' DECISION DOES NOT "REVISE" SECTION 11107

Petitioners' primary argument is that the court of appeals ignored what they assert is the "plain meaning" of Section 11107 by holding that the phrase "highest rate of wages at the port" refers to the "highest rate of wages" that could be obtained by a seaman at the relevant port "who has the same rating as the complainant." Pet. App. A at 11a. Petitioners are incorrect. The court of appeals' decision does nothing more than adopt a reasonable construction of facially ambiguous statutory language in a manner that is supported by more than 150 years of uniform judicial authority.

A. The Court Of Appeals Correctly Recognized That The Phrase "Highest Rate Of Wages At The Port" In Section 11107 Is Ambiguous On Its Face

As the court of appeals properly recognized, the "plain meaning" of a statute can be controlling, by definition,

only where the relevant statutory language is unambiguous. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Statutory language is "ambiguous" if it is reasonably susceptible to more than one interpretation. *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 227 (1994).

The phrase "highest rate of wages at the port" in Section 11107 is ambiguous on its face, as four of the five judges who have examined this language have concluded.[2] The word "rate" is defined as "proportional or relative value, measure or degree; the proportion or standard by which quantity of value is adjusted." Black's Law Dictionary (4th ed. 1968). The term "rate of wages," like the word "rate," therefore is a relative term that necessarily takes its meaning from the words and phrases that qualify or explain it.

The text of Section 11107 does not provide any words to qualify or explain the phrase "highest rate of wages." It simply does not specify, for example, the relevant occupation or industry from which the "highest rate of wages" figure is to be drawn. For example, if the relevant industry were the maritime industry, the "highest rate of wages" could be the rate paid to the captain of a supertanker or a luxury liner who happened to be engaged at the same port as the claimant, or the rate paid to a non-vessel employee such as a crane operator or harbor master. It also could be the highest rate paid to a wealthy businessperson, owner or investor who happened to have an office at the relevant port. Nothing in the "plain language" of the statute indicates which of these alternatives is to be adopted.

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[2] Like the court of appeals, United States District Court Judge Moskowitz, whose unpublished opinion is cited by the crew members, Pet. at 9 n.5, concluded that Section 11107 is ambiguous and that its proper construction is a "close question." The district court here is the only court that has found the meaning of Section 11107 to be "plain."

Because the language of Section 11107 does not specify the measures or standards necessary to impart clear meaning to the phrase "highest rate of wages at the port," the statute is unquestionably ambiguous and, therefore, has no "plain" meaning. Instead, the meaning of the phrase "highest rate of wages at the port" must be determined by established rules of statutory construction, legislative history, and judicial constructions of analogous maritime statutes. These sources of interpretation support the holding below.

B. The Court Of Appeals' Construction Of The Phrase "Highest Rate Of Wages At The Port" In Section 11107 Is Consistent With The Text Of The Statute As A Whole And Cases Interpreting Similar Language In Predecessor Maritime Statutes

Applying the available tools of statutory construction, the court of appeals adopted a construction of the phrase "highest rate of wages at the port" that is consistent with the text of Section 11107 as a whole and cases interpreting similar language in predecessor maritime statutes. As the court of appeals properly recognized, Section 11107 provides that a seaman engaged "contrary to a law of the United States" may recover the "higher" of two alternative wage rates. The first is the "highest rate of wages at the port from which the seaman was engaged." The second is the "amount agreed to be given the seaman at the time of engagement." 46 U.S.C. § 11107. Thus, by its express terms, the statute requires in all cases a comparison between the "highest rate of wages at the port" and the amount "agreed to be given" to the claimant.

If, as the crew members contend and the district court concluded, the "highest rate of wages at the port" meant the highest paid seaman, regardless of job description, the amount could never be less than the "amount agreed to be given the seaman at the time of engagement." Under this interpretation, there would be no need to determine the rate "agreed to be given" to the seaman, and that portion

of Section 11107 would become superfluous. The two-pronged structure of Section 11107 makes sense only if the phrase "highest rate of wages at the port" refers to the market rate of wages for a similarly situated seaman with like position and duties. The crew members never addressed this point below, and do not address it here.

This construction of Section 11107 is confirmed by more than 150 years of judicial decisions interpreting predecessor statutes to Section 11107. For example, courts applying R.S. § 4523, the direct predecessor to Section 11107, held without exception that the phrase "highest rate of wages at the port from which the seaman was shipped" in that statute meant the highest rate of wages for a similarly situated seaman. *The Pacific*, 23 F. 154 (W.D. Pa. 1885) ("highest rate of wages" recoverable by deckhand shipped without written articles was "the rate of wages for that trip for deckhands"); *Lent Traffic v. Gould*, 2 F.2d 554 (3d Cir. 1924) (tacitly construing Section 4523 to require river pilot be paid "highest" wage of a river pilot).

Courts construing other maritime statutes with similar language likewise have, as the court of appeals observed, reached the same results. Pet. App. A at 12a-13a. *See, e.g., The James H. Shrigley*, 50 F. 287 (N.D.N.Y. 1892) (interpreting R.S. 4520 and 4521, applicable to coastwise seamen, as entitling a cook to recover "highest" wage for a cook); *The Lud Keefer*, 49 F. 650 (W.D. Pa.), *modified*, 51 F. 44 (3d. Cir. 1892) (concluding that a pilot was entitled under Section 4521 to the "highest" pilot's wage); *The Australia*, 2 F. Cas. 236 (D. Me. 1859) (interpreting predecessor to R.S. 4521 as permitting cook to recover "highest" wage rate for a cook).[3]

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[3] The court of appeals' construction of Section 11107 is also consistent with the statute's sparse legislative history. The House Report that accompanied the legislation in 1983 explained that the bill was "for the most part a restatement of the existing safety and seamen protection laws administered by the Coast Guard." H.R.

This Court's decision in *Griffin v. Oceanic Contr., Inc.*, 458 U.S. 564 (1982), on which Petitioners rely heavily, is not to the contrary. The question in *Griffin* was whether the district courts, exercising their equitable powers, may reduce the monetary recovery required by 46 U.S.C. §§ 10301-10321, where the resulting award seems excessive. The statutes primarily at issue in *Griffin* were Section 10321, which expressly provides that, where an employer fails to provide written agreements for foreign and intercoastal voyages, "the vessel is liable in rem" for "a civil penalty of not more than $5,000" per violation, 46 U.S.C. § 10321; and Section 10313(g), which expressly provides that any employer who delays payment of wages is liable for a "penalty" of two days' wages for each day of delay. 46 U.S.C. § 10313(g).

The court of appeals in *Griffin* recognized that the language of Section 10313(g) was "plain," but nevertheless held that the district court had discretion not to impose the statutorily required penalty, concluding that a literal interpretation of the statute would produce an "absurd and unjust result which Congress could not have intended." *Griffin*, 458 U.S. at 574. This Court reversed, holding simply that the unambiguous language of Section 10313(g) must be enforced even where such enforcement results in large punitive awards. *Id.* at 574-77.

Rep. No. 98-338, *reprinted in* 1983 U.S.C.C.A.N. 924, 929. The Report went on to explain the purpose of Section 11107 as follows: "Section 11107 entitles seamen engaged contrary to any United States law to leave the service of the vessel without loss of wages." *Id.* at 1018. In contrast, for coastwise voyages, it explained that "Section 10508 provides a fair wage to be paid to a seaman who was engaged without a shipping agreement. . . . It also provides a penalty for violation of its provisions." *Id.* at 1012. *See also id.* at 1010 (discussing similar "penalty" provisions of Section 10321 for foreign voyages). This legislative history makes clear that Congress intentionally decided not to impose a penalty for violating the written agreement requirement of Section 10601, in contrast to its decision to include a punitive sanction for the same violation in the merchant seaman industry.

The phrase "highest rate of wages at the port" in Section 11107, unlike the language of Section 10313(g), is ambiguous on its face. The meaning of that phrase therefore must be determined by resort to established principles of statutory construction. Thus, the holding below does no violence to the statutory text and does not warrant review.

Nor is there any merit to the crew members' assertion that the court of appeals' construction of Section 11107 will unfairly burden seamen by forcing them to engage in "years" of fact-ridden litigation to establish the particular "highest rate of wages" to which they are entitled. The crew members make no attempt whatsoever to explain why demonstrating the "highest rate of wages" for a similarly situated seaman is inherently more difficult than demonstrating the "highest rate of wages" for non-similarly situated seamen. A plaintiff can meet this burden simply by subpoenaing the records of a single vessel owner who hires similarly situated seamen from the same port from which the claimant embarked.

II. THIS CASE, IN ANY EVENT, IS NOT THE PROPER VEHICLE FOR THIS COURT TO RESOLVE THE PROPER CONSTRUCTION OF THE PHRASE "HIGHEST RATE OF WAGES" IN SECTION 11107

If there is any question as to whether the court of appeals' construction of the phrase "highest rate of wages at the port" is correct, this case nevertheless is not the proper vehicle to resolve the issue for at least three reasons. First, the court of appeals' decision is the first reported opinion even to address the issue. Resolution of the issue by this Court should wait until a conflict arises among the lower courts.[4]

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[4] The crew members misleadingly suggest, Pet. at 4, that the absence of any conflict among the lower courts has no significance where maritime statutes are at issue. None of the cases cited by the crew members provides any support for their position. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468

Second, the construction of the phrase "highest rate of wages at the port" urged by Petitioners would not benefit them because it would result in a punitive award and, accordingly, would not be enforceable *in rem*. Historically, a seaman's wage lien arises only to compensate the seaman for services rendered to the vessel. *Long Island Tankers Corp. v. S.S. Kaimana*, 265 F. Supp. 723, 726 (N.D. Cal. 1967), *aff'd* 401 F.2d 182 (9th Cir. 1968); *Citibank, N.A. v. Vessel American Maine*, 865 F.2d 24, 27 (9th Cir. 1988). Congress codified the historical right to a compensatory seaman's wage lien in 46 U.S.C. § 31301, providing a statutory "preferred maritime lien" for "*wages of the crew of the vessel.*" (emphasis added). Recognizing that Congress did not alter the historical limitations on maritime liens, courts have uniformly held that the phrase "wages of the crew" includes only compensation for services actually rendered to the ship. *See, e.g., The Eastern Temple*, 94 F.2d 374, 376 (4th Cir. 1938); *Nadle v. M.V. TEQUILLA*, 1973 AMC 909 (S.D.N.Y. 1973); *Prudential Ins. v. U.S. Lines, Inc.*, 915 F.2d 411 (9th Cir. 1990).[5]

(1987), *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981), and *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), involved the rights of private parties under the Eleventh Amendment or specific federal statutes to sue government officials or agencies. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), *Director, Office of Workers' Comp. Prog. v. Perini North River Assoc.*, 459 U.S. 297 (1983), and *Morrison-Knudsen Const. Co. v. Director, Office of Workers' Comp. Prog.*, 461 U.S. 624 (1983), involved the interpretation of the Longshoremen and Harbor Workers' Compensation Act, which affects the entire maritime industry. Neither issue is presented here.

[5] Congress has created narrow statutory exceptions to this rule under specific circumstances. *See, e.g.*, 46 U.S.C. § 10321 (requiring that seamen on foreign voyages be provided with written contracts, providing a "civil penalty of not less than $5,000 per violation" and making the "vessel liable *in rem*" for that penalty); 46 U.S.C. § 10508 (same). Section 11107, however, contains no such exception, and therefore is subject to the normal rule that punitive damages, or "penalties," are not recoverable *in rem*.

Finally, the correctness of the court of appeals' ruling here may have no practical significance to the parties. As previously mentioned, since the decision of the court of appeals was rendered, this case has already been tried, with Petitioners urging the district court to award them a larger amount than the previous award. If the district court agrees with the crew members' arguments, the court of appeals' decision, and any decision reached by this Court regarding the proper construction of Section 11107 would have little or no practical impact on the parties.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

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